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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

No.

KAREN AND MICHAEL DERZACK,

Petitioners,

v.

ALLEGHENY COUNTY CHILDREN & YOUTH SERVICES

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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13 pp

QUESTION PRESENTED FOR REVIEW

Did it violate due process of law to remove two children from their prospective adoptive family when no notice was provided to the family that placement of the children would be addressed at the court hearing resulting in the removal order?

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PARTIES TO THE PROCEEDING

A list of parties to the proceeding in the Supreme Court of Pennsylvania is as follows:

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OPINIONS BELOW

The Opinions of the Superior Court of Pennsylvania, of the Court En Banc and of the Hon. Joseph A. Jaffe of the Court of Common Pleas of Allegheny County are filed at Appendix 2A - Appendix 150A.

JURISDICTION

The Supreme Court of Pennsylvania entered judgment affirming the decision of the Superior Court of Pennsylvania on September 8, 1997. This Petition for a Writ of Certiorari was filed within ninety (90) days of judgment by the Pennsylvania Supreme Court. This Honorable Court's jurisdiction is invoked under 28 U.S.C. Section 2106.

STATEMENT OF THE CASE

Byrae Lafay Griffin was born on July 30, 1991. Her younger brother, Byron Todd Griffin, was born on July 15, 1992. Both children are African-Americans. They were born addicted to drugs.

Byron was adjudicated dependent after his mother, LaShawn Jeffrey, abandoned him following his birth. At the age of six days, he was placed in the home of Michael and Karen Derzack, a white foster care family with Family Services of Western Pennsylvania

(hereinafter "the Derzacks"). Byron stayed with the Derzacks until, in December of 1992, the Derzacks conveyed to Allegheny County Children and Youth Services (hereinafter "CYS") their desire to adopt Byron. CYS promptly notified the Derzacks that Byron would be removed from their home due to a formal transracial placement policy banning the "displacement" of African American children in white homes.

On October 6, 1994, the trial court placed both Byrae and Byron with the Derzacks as prospective adoptive parents. See October 6, 1994 Order of Court at Appendix 151A. In a subsequent order, the trial court terminated Ms. Jeffrey's parental rights.

In 1995, CYS filed contempt petitions against the Derzacks alleging that the Derzacks had interfered with court ordered visitation, had failed to permit announced and unannounced visits of their home by CYS; had taken Byrae and Byron out of the jurisdiction without permission; had failed to correct errors on their

application to adopt Byrae and Byron and had violated the court's gag order.

A hearing on the CYS contempt petitions was held before a court *en banc* on December 13, 1995. The court took the matter under advisement.

On January 12. 1996, the attorney for the Derzacks' received an order dated January 10 scheduling a "brief hearing" for January 17, 1996 for relevant testimony on issues that may have arisen since the hearing of December 13, 1995. On January 13, 1996, their attorney received another order scheduling a continued contempt hearing for the Derzacks for January 17, 1996. No reasons were provided to counsel for holding the January 1996 hearing.

At the January 17, 1996 hearing, the Derzacks presented motions, including a Motion for a Continuance which objected to the hearing on the basis that any hearing for which the parties are not notified of the purpose is violative of due process. The Motion for a

Continuance was denied. See Transcript, Proceedings, January 17, 1996 at Appendix 155A.

The court announced its decision to remove Byrae and Byron from the Derzacks' care, based on testimony taken on December 13, 1995 and January 17, 1996, at the conclusion of the hearing. See Transcript, Proceedings, January 17, 1996 at Appendix 155A

A subsequent appeal to the Superior Court of Pennsylvania raised the issue of the violation of due process. See Brief of Appellant, Questions Presented for Review, at Appendix 161A.

The Derzacks' Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on September 8, 1997.

REASON FOR GRANTING THE WRIT

No person can be deprived of a property or liberty interest absent procedural due process. Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1975). The courts

have held procedural due process to be an absolute right. Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 1053 (1978); Bradley v. Pittsburgh Board of Public Education, 913 V.2d 1064, 1077 (3d Cir. 1990).

The Derzacks became prospective adoptive parents following the October 6, 1994 Order of Court placing the subject minor children with them. By encouraging the type of long term parent-child relationships normally expected of biological families, the state has triggered due process protections. Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388 (1982) (recognizing that parents possess a fundamental liberty interest in the care and custody of their children that is protected by the Due Process Clause of the Fourteenth Amendment); Walker v. Johnson, 891 F.Supp. 1040 (M.D. Pa. 1955).

Fundamental fairness would require that the parties be notified that loss of custody was an issue to be addressed in the December 13, 1995 and January 17,

1996 proceedings and that they be given an adequate opportunity to defend themselves against the sanction sought. See, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct.. 1487 (1985). No such notice or opportunity was provided to them.

Removal of children from their caretakers is not , under Pennsylvania law, an available remedy for the contempt petitions filed against the Derzacks. Choplosky v. Choplosky, 400 Pa. Super. Ct. 590, 584 A.2d 340 (1990); see also, Koslowski v. Koslowski, 362 Pa. Super. Ct. 516, 524 A.2d 995, 997 (1987). Consequently, the Derzacks had no notice that their children might be removed pursuant to the contempt proceedings. Additionally, they had no opportunity to prepare a defense to a request for removal.

On January 12, 1996, the Derzacks' attorney received a court order scheduling a "Brief Hearing" for January 17 to address "issues that may have arisen since the last hearing on December 13, 1995." Any

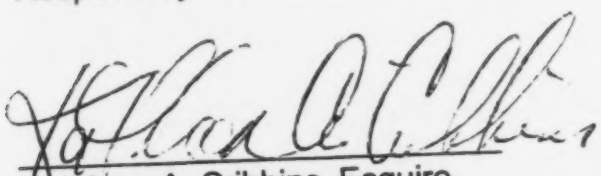
attempt to argue that an adequate defense to removal could have been presented on January 17, 1996 would be specious since the hearing was limited to matters arising **since** December 13.

Due process demands a meaningful opportunity to be heard. Armstrong v. Mango, 380 U.S. 545, 85 S.Ct. 1187 (1965). Where such a meaningful opportunity to be heard is lacking, due process is violated and the resulting order is unconstitutional.

CONCLUSION

It is respectfully requested that this Honorable Court grant review as the Petitioners were denied due process of law.

Respectfully submitted,



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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: BYRAE LAFAY GRIFFIN,	: No. 182 W.D.
a/k/a BYRAE LAFAY JEFFREY and	: Alloc. Dkt. 1997
BYRON TODD GRIFFIN, a/k/a	: No. 183 W.D.
BYRON TODD JEFFREY,	: Alloc. Dkt. 1997
	:
v.	: Petition for
PETITION OF MICHAEL AND	: Allowance of
KAREN DERZACK	: Appeal from the
	: Order of the
	: Superior Court

ORDER

PER CURIAM

AND NOW, this 8th day of September, 1997, the

Petitions for Allowance of Appeal are denied.

A True Copy Candace Y. Fry
as of: September 8, 1997
Attest: /s/ Candace Y. Fry
Chief Clerk
Supreme Court of Pennsylvania

IN RE: BYRAE LAFAY GRIFFIN A/K/A BYRAE LAFAY JEFFREY AND BYRON TODD GRIFFIN, A/K/A BYRON TODD JEFFREY	: IN THE SUPERIOR : COURT OF : PENNSYLVANIA :
	: NO. 00215
APPEAL OF: MICHAEL AND KAREN DERZACK	: PITTSBURGH,1996 :

Appeal from the Order in the Court of Common Pleas of Allegheny County Juvenile Division, Nos. J 2625 91 & J 1608 92

IN RE: BYRAE LAFAY GRIFFIN, A/K/A BYRAE LAFAY JEFFREY AND BYRON TODD GRIFFIN, A/K/A BYRON TODD JEFFREY	: : : :
	: NO. 00224
APPEAL OF: MICHAEL AND KAREN DERZACK	: PITTSBURGH,1996 :

Appeal from the Order in the Court of Common Pleas of Allegheny County, Orphans Court Division, No. 307 of 1994

BEFORE: TAMILIA, JR., JOHNSON, J., and BROSKY, J.

OPINION BY TAMILIA, J.: FILED: February 19, 1997

Michael and Karen Derzack appeal from the January 17, 1996 Order entered by Juvenile Court sitting en banc.[1] The Order which followed the latter of two

[1] The court en banc consisted of the Honorable Joseph A. Jaffe, the Honorable Max Baer and the Honorable Cheryl Allen Craig.

contempt hearings, removed Byrae and Byron Griffin from the physical custody of appellants and granted Allegheny County Children and Youth Services (hereinafter "CYS") permission to place the children in alternative adoptive foster care. The court en banc ordered removal after finding that appellants had violated no less than eight Orders of court concerning the care and custody of the Griffin children. The facts relevant to this appeal are set forth by Juvenile Court as follows, with the Orders deemed violated by appellants indicated in bold.

> Byrae was born drug-addicted, on July 30, 1991 to LaShawn Jeffrey (hereinafter, "Mother") and Todd Griffin. Approximately one year later, on July 15, 1992, Byron was born drug-addicted to the same parents. On November 30, 1992, four months after Byron's birth, Todd Griffin died in an automobile accident. Byron and Byrae have three older siblings (brothers) who are the natural children of Mother but have different fathers. Byron is the youngest of Mother's five children.

We note that noting in the procedural statutes governing the conduct of Juvenile Court hearings provides for an en banc proceeding. However, although appellants filed a Motion to Strike the Court En Banc, R. 429b, they have not appealed from the denial of that motion. Accordingly, any challenge to the propriety of the en banc proceeding was not preserved and is not at issue in this appeal.

Byrae first came to the attention of this Court in November 1991. Byrae, then three months of age, drug-addicted and weighing only seven pounds, six ounces, was removed from Mother's care and taken by paramedics to Children's Hospital where she was diagnosed as suffering from severe malnutrition, dehydration and a severe skin infection. Children's Hospital reported Byrae to be "near death" when admitted.

Following a hospitalization of one week, the matter of Byrae and her three older siblings was brought before this Court pursuant to a Petition for Dependency filed by CYS. On November 21, 1991, Byrae and her three older brothers were adjudicated dependent. Byrae remained hospitalized unable to be brought to Court on the day of adjudication. Her older siblings were present in Court and were removed that day by CYS from Mother's custody with Mother's consent, pursuant to Mother's acknowledgment that she was unable to care for her children because of a chronic drug dependency. Upon her discharge from Children's Hospital, Byrae was placed by CYS into the care and custody of her paternal grandmother, Flora Griffin Shapiro. Byrae remained in the home of Flora Griffin Sharpiro for the next eighteen months.

Between the period of November 1991 to July 15, 1992, this Court held several hearings regarding the welfare of Mother's children wherein evidence of the severe nature and extent of the neglect suffered by Byrae and her older siblings was placed on the record. Based upon the serious nature of the information contained in the record, Byron's special health needs at birth as a result of his drug-addiction and Mother's abandonment of Byron when she failed to return to the hospital to

take him home following his birth, CYS immediately filed a Petition for Dependency, with respect to Byron, within days of his birth. This Court entered an Order on July 27, 1992 adjudicating Byron a dependent child. For purposes of placement, Byron was designated a "child in need of special care".

Initially, CYS sought placement of Byron with relatives. When efforts to place him with relatives failed, CYS selected and approved the Derzacks, a foster care family with Family Services of Western Pennsylvania (hereafter, "Family Services"), as a *special needs care family,* for the singular purpose of accepting placement of Byron for a temporary period of time after his discharge from the hospital. The original understanding between CYS and the Derzacks was that Byron was being placed with the Derzacks for a few days, pending the outcome of the CYS' petition for Dependency which had been filed on Byron's behalf. Byron was placed with the Derzacks on July 21, 1992. On the date of his first placement, Byron was six days old.

Following the dependency adjudication, CYS returned Byron to the Derzacks' home while an adoption plan was being developed. Byron's original adoption plan was being developed under a new CYS policy which had been adopted on May 15, 1992 by CYS and captioned, "Children and Youth Services Transracial Placement Policy" (hereafter "transracial placement policy"). The transracial placement policy was an internal policy which grew out of a national concern for African-American children being displaced in white homes and the impact of such placements on their lives. This policy was drafted by a CYS committee chaired by Mary C. Young, then the Recruitment

and Placement Resources Manager for Children and Youth Services. As a matter of routine, draft copies of the transracial placement policy were circulated within the agency and the Court for review. On or about February 14, 1991, the Honorable Cheryl Allen Craig, a young, newly-appointed judge in the throes of her first election, received a courtesy copy of CYS' transracial placement policy to review. In the cover letter accompanying the draft of CYS' transracial placement policy, Ms. Young requested feedback from Judge Craig regarding CYS': (1) rationale for the policy, (2) limitations placed on how long a child could wait to be placed in an adoptive home of the same ethnic background, (3) position regarding children of mixed parentage and (4) position regarding permanency. The last paragraph of Ms. Young's letter of February 13, 1991 read: "We would greatly appreciate your responses on this matter, if it will be of no conflict of interest in your present capacity. Please call me if you have any questions and/or advice on this subject." Ms. Young was deposed by counsel for the Derzacks on March 2, 1995. When asked, "Do you know if Judge Craig responded to this letter?", Ms. Young Testified, "She did not". Although Byron and the Derzacks' case fell under CYS' transracial adoption policy, Byron's status in the Derzacks' home remained uninterrupted for five months while CYS completed his adoption plan and identified an African-American pre-adoptive home.

By letter dated December 15, 1992, CYS advised the Derzacks that a pre-adoptive home had been found for Byron and that a representative of CYS would arrive at the Derzacks' home on December 16, 1992 to take him away. The Derzacks responded to the CYS letter by notifying

the news media to come to their home to film their planned confrontation with CYS. To avoid a confrontation with the Derzacks and trauma to Byron, CYS left Byron in the Derzacks' home and petitioned the Court that day for an immediate hearing to resolve the impasse. A hearing on CYS' petition was held before this Court on the following day, December 17, 1992.

At the hearing held December 17, 1992, this Court specifically addressed CYS' internal transracial placement policy and determined that CYS' selection of an African-American pre-adoptive home for Byron, solely on the basis of color was not in the best interest of the child. Consequently, this Court overruled CYS' internal transracial placement policy and entered an Order continuing Byron's placement with the Derzacks. This Court further ordered CYS to assist the Derzacks in adopting Byron, thus rendering moot, the issue of transracial adoption with respect to the Derzacks, this Court having found in favor of the Derzacks when Byron was returned to them, for the purpose of adoption, in December 1992.

With the exception of giving birth to Byron on July 15, 1992, Mother remained absent from and uninvolved in the rearing of Byron and Byrae from November 1991 until January 1993. On or about January 1993, Mother visited with Byrae, who was then living with her paternal grandmother, and attempted to reestablish a mother-child relationship with Byrae, for the first time since the child's dependency adjudication in November 1991. No attempt was made by Mother to visit with Byron, at this time. The Court, therefore, returned Byron to the Derzacks, following a review hearing held on March 12, 1993. Dr. Patricia Piercy was appointed to conduct psychological

evaluations of Byron and to monitor and evaluate his adjustment to living with the Derzack family.

In late March 1993, Mother contacted CYS and, for the first time since his birth, requested to visit with Byron. Although still drug dependent, Mother advised CYS the she had completed a twenty-eight day program in Meadeville, Pennsylvania and desired to find placement in a longer term drug rehabilitation program with the hope that she could eventually regain custody of her children. Subsequently, Mother was accepted into an inpatient drug rehabilitation program at the Sojourner House in Pittsburgh, Pennsylvania. Her official entry date into the program was April 6, 1993.

Based upon Mother's success at Sojourner House, this Court entered an Order on June 25, 1993 reuniting Mother and Byrae. Byrae was removed from the home of her paternal grandmother and sent to live with Mother and Byrae at Sojourner House. On December 20, 1993, based upon progress shown in Mother's treatment in her drug rehabilitation program and her desire to be reunited with her youngest child, this Court ordered that Byron be sent to live with Mother and Byrae at Sojourner House. The Order included a stipulation that in the event that Byron needed "respite, shelter or temporary care", the Derzacks should provide it.

On December 21, 1993, the Derzacks issued a news release criticizing Mother. After the news release, the Derzacks contacted the news media and invited them to be in attendance at their home to film and report Byron's removal. Even though CYS attempted to avoid additional media exposure to Byron by changing the removal date

from December 28th to December 27th, the Derzacks were successful in creating another media spectacle of the event. In spite of the media spectacle, Byron was removed from the Derzacks' home on December 27, 1993, pursuant to this Court's Order of December 20, 1993.

On **January 24, 1994**, this Court issued an Order prohibiting the discussion of Byron in public by anyone involved in any capacity with Byron's care and granted the Derzacks permission to visit with Byron four hours a month. This Court was advised on or about February 1994 that the Derzacks had ignored the January 24, 1994 court Order and had hired a writer with whom they intended to co-write a book about Byron entitled, "Bird Without Feathers". "Bird Without Feathers" was subsequently written and published.

Mother, Byrae and Byron lived together at Sojourner House until April 1994. In April 1994, Mother was released from Sojourner House and entered a relapse prevention program known as the Penn Free Program with Byron and Byrae. The Penn Free Program is designed to assist chemically dependent individuals in making the transition from a structured rehabilitation program to independent living in the community. On April 20, 1994, the Derzacks' visitation privileges, as to Byron, were terminated when Michael Derzack spoke to the media in violation of this Court's January 1994 Order prohibiting the discussion of Byron in public. In spite of the Court's termination of their visitation privileges, the Derzacks continued to place Byron's case before the public, in complete disregard for the Order of Court prohibiting such behavior.

In spite of the intensive assistance provided by the Penn Free Program and the Right Start Program, an in-home parenting service provided to Mother four days a week by CYS, mother renewed her drug use in June 1994.

On June 28, 1994, Byron and Byrae were removed from the custody and care of Mother when the Court received evidence that Mother was again using crack cocaine. By Order of Court, as a temporary measure until further order of court, Byron and Byrae were placed with their older siblings in the home of their maternal great aunt, Marion Ellis. This was the third placement family for both Byron and Byrae.

On July 5, 1994, this Court reviewed Byron's and Byrae's temporary placement with Marion Ellis. At this hearing, the Court ordered the continued temporary placement of Byron and Byrae with Marion Ellis and interactional and developmental evaluations of Mother and all of her five children. Mother was also granted unlimited supervised visits with Byron and Byrae based upon her renewed active participation in the Penn Free Program. In spite of the efforts of the Court and CYS to assist Mother in every way possible to maintain a relationship with Byron and Byrae, Mother resumed her drug use within two weeks of issuance of the July 5, 1994 Order of Court. Consequently, this Court granted a Petition to intervene filed by the Derzacks and directed CYS to file a petition to terminate Mother's parental rights as to Byron and Byrae within ninety days. Interactional and developmental evaluations of Marion Ellis, the Derzacks, Byron and Byrae were ordered by the Court.

Byron and Byrae remained in the care and custody of Marion Ellis until October 6, 1994. During the time that Byron lived with Marion Ellis, he continued to visit with the Derzacks. Based upon the recommendations set forth in the interactional and developmental evaluations and upon Marion Ellis' health and surrogate responsibilities with regard to Mother's three older children, this Court determined that it was in the best interest of Byron and Byrae to be placed with the Derzacks for the purpose of adoption.

In preparation for what was hoped to be Byron and Byrae's last placement into the care and custody of the Derzacks to await completion of the Derzacks' adoption plan, this Court entered an Order on **October 5, 1994** which incorporated dependency restrictions and foster care regulations. The dependency restrictions and foster care regulations clearly stated that written consent from CYS or an Order of Court was needed for the Derzacks to travel outside of Allegheny County with Byron and Byrae. This Order was later ignored by the Derzacks when they travelled with Byron and Byrae to California and New York to tape several nationally televised talk shows discussing the children without written consent from CYS or this Court.

On **October 6, 1994**, this Court ordered that both Byron and Byrae be immediately placed with the Derzacks as an adoptive foster care placement and, inter alia, that supervised visitation privileges be granted to Byron and Byrae's Mother, paternal grandmother and three older siblings. Two weeks later, on October 20, 1994, the Derzacks appeared in The Maury Povich Show, a nationally televised talk show, discussing Byron and his case, in violation of this Court's Order of

January 24, 1994. In response, the child advocate representing the interests of Byron and Byrae petitioned this Court to find the Derzacks in contempt of court for violation of its Order of January 24, 1994. On **November 14, 1994,** this Court entered a second Order prohibiting all parties from exposing Byron and Byrae to the public vis-a-vis discussions or references.

On **April 12, 1995**, this Court heard CYS' petition to involuntarily terminate Mother's parental rights and entered supplemental orders which modified this Court's October 6, 1994 Order by (1) granting visitation rights to additional relatives of Byron and Byrae, (2) providing a time certain for Byron and Byrae's great aunt, paternal grandmother and siblings to visit with the children and (3) reaffirming its November 14, 1994 Order that all parties refrain from public discussion or reference to the children.

At the Derzacks' contempt hearing held December 13, 1995 before the court en banc, Timothy Jashinski, an adoption caseworker for CYS, testified that the Derzacks initially permitted Byron's and Byrae's great aunt, paternal grandmother and siblings to visit the children upon request for several months, in compliance with this Court's Orders. Then, shortly after learning of CYS' petition for termination of the parental rights of Mother, the Derzacks began to refuse to allow Byron and Byrae to visits with their relatives and siblings unless they (the Derzacks) were permitted to be a part of the visits. (Tr.30, 103). Timothy Jashinski testified that the Derzacks unilaterally terminated Byron and Byrae's visits with their relatives and siblings, in August 1995, stating to CYS that their attorney had told them that they had been "granted" or "appointed" *in loco parentis,* they

repeatedly used the term to justify their refusal to obey any and all Court Orders issued after April 1995.

On **May 9, 1995,** this Court entered an Order directing CYS to comply with this Court's Order of October 6, 1994, with respect to family member visitations with the children. The Order of May 9, 1995 further directed CYS to arrange for professional therapeutic intervention, consultations and evaluation of Byron and Byrae. Additionally, the CYS caseworker was ordered to make announced and unannounced visits at the home of the Derzacks. In May 1995, Dr. Debra Klosterman, was under contract with CYS to observe Byron and Byrae's interactions with the Derzacks and with their relatives and siblings during scheduled visits. (T. 105). The Derzacks, however, failed or refused to schedule visits with Dr. Klosterman and Byron and Byrae until after the Contempt hearing held on December 13, 1995.

On **August 14, 1995,** this Court found that it was in the best interest of Byron and Byrae to visit with their siblings and their paternal grandmother and ordered that the siblings and paternal grandmother visit with Byron and Byrae every week, free of observation, attendance or participation of the Derzacks until further Order of Court. The Order of November 14, 1994, prohibiting all parties from exposing Byron and Byrae to the public vis-a-vis discussions or references, was to remain in full force and effect.

In spite of the Orders of October 5, 1994, prohibiting travel outside of Allegheny County without the consent of CYS or the Court, the Derzacks travelled to New York with Byron and Byrae to appear on the Montel Williams talk show

on October 16, 1995 and, as part of their interview, mentioned over national television the children's names and discussed the circumstances surrounding the children being in their care. Since October 16, 1995, the Derzacks have appeared on the following nationally televised talk shows discussing Byron, Byrae and/or their legal and personal efforts to gain custody of the children: Sally Jesse Raphael Show, the Leeza Gibbons Show and the Rikki Lake Show. This Court takes judicial notice of Byron and Byrae's appearance "on camera" on at least three of the televised talk shows and of the appearance of their names and photographs in numerous newspaper articles. The unauthorized travel to appear on talk shows and the intentional exposure of Byron and Byrae to the media, for the purpose of discussion of this case, was in violation of this Court's Orders of October 6, 1994, November 14, 1994, April 12, 1995 and August 14, 1995.

On October 27, 1995 Timothy Jashinski made an announced, prescheduled visit to the home of the Derzacks and was prevented by Karen Derzack from speaking privately with Byron and Byrae and observing their physical condition up close. According to Timothy Jaskinski's testimony, Karen Derzack placed Byron and Byrae at the top of the stairs while he remained at the bottom of the stairs, believing that he was not permitted to go up the stairs. (Tr. 103). After asking Byron and Byrae two or three general questions, Karen Derzack abruptly terminated Timothy Jashinski's visit with the children by telling him that "the questions will stop". (Tr. 88).

In November 1995, this Court was advised by the child advocate representing Byron and Byrae, that based upon information contained in a

federal lawsuit for workers compensation filed by Karen Derzack in August 1994, Karen Derzack had failed to properly answer a question on the Derzacks' foster care application which concerned past treatment for a mental illness. This same question was also improperly answered on the Derzacks' application for adoption. The Court was further advised that the Derzacks had falsely represented their income on either their IRS tax returns or their adoption application or both, as these two documents reflected a significant discrepancy of tens of thousand of dollars per year in the Derzacks' reported annual income from 1990 to 1993.

On December 1, 1995, one day before the instant Contempt hearing, the Derzacks filed for personal bankruptcy claiming debts in excess of $540,000.00. The Derzacks stated that their legal expenses had forced them into bankruptcy.

(Slip Op., Craig, J., 5/10/96, pp. 2-13; emphasis added.)

Hearings on CYS' petition and amended petitions for contempt were held on December 13, 1995 and January 17, 1996. At the conclusion of the latter hearing, the court adjudicated appellants in contempt of the eight Orders of court indicated above in bold and directed CYS to immediately remove Byron and Byrae for the purpose of placing them with another pre-adoptive foster family. This appeal followed.

Before turning to the substance of appellants' claims, we must first address three procedural issues. Initially, appellants claim Juvenile Court lacked jurisdiction "to alter the placement of two dependent children when the placement Order was the subject of two pending appeals before the Superior Court." (Appellants' brief at 4.) The "two pending appeals" referred to by appellants were the appeal by LaShawn Jeffrey from the April 12, 1995 Order terminating her parental rights,[2] and the appeal of Marion Ellis from the October 6, 1994 Order returning the children to appellants' home.[3] Appellants' brief argument on this point is premised on Pa.R.A.P. 1701, which provides as follows:

> Rule 1701. Effect of Appeal Generally
>
> (a) General rule. [A]fter an appeal is taken. . the trial court or other government unit may no longer proceed further in the matter.

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[2] Ms. Jeffrey's appeal was denied on June 3, 1996. *In re: Byron Jeffrey and Byrae Griffin*, 01862 Pittsburgh, 1994.

[3] Ms. Ellis' appeal was denied on May 13, 1996. *In Re: Byron Griffin*, 02052 Pittsburgh, 1994.

We reject appellants' claim that Rule 1701 ousted the jurisdiction of Juvenile Court to conduct the contempt hearings at issue. Initially, appellants' argument overlooks subsection (c) of Rule 1701, which provides:

> Rule 1701. Effect of Appeal Generally
>
> (c) Limited to matters in dispute.—Where only a particular item, claim or assessment adjudged in the matter is involved in an appeal, or in a petition for review proceeding relating to a quasijudicial order, the appeal or petition for review proceedings shall operate to prevent the trial court or other government unit from proceeding further with only such item, claim or assessment. . .

Since the appeals pending at the time of the instant contempt hearings related only to the termination of LaShawn Jeffrey's parental rights and removal of the children from the physical custody of Marion Ellis, they did not prevent Juvenile Court from considering whether appellants had violated the Order regarding *their* custody of the children. Simply put, the Orders challenged in the pending appeals were neither relevant to nor at issue in the contempt proceedings. Thus, each pending appeal raised a "particular item [or] claim" and Juvenile Court was

precluded from proceeding "with only such item [or] claim[.]" On this basis, we find that Juvenile Court retained jurisdiction over all issues relating to the contemptuous conduct of appellants. A review of Juvenile Court's statutory authority further supports this conclusion.

The Juvenile Act, 42 Pa.C.S. § 6301 *et seq.*, clearly vests in Juvenile Court a broad and continuing power to adjudicate in the best interests of dependent children. For instance, 42 Pa.C.S. § 6351(a) provides in relevant part:

> § 6351. Disposition of dependent child
>
> (a) General rule.—If the child is found to be a dependent child the court may make any of the following orders of disposition best suited to the protection and physical, mental, and moral welfare of the child:
>
> (1) Permit the child to remain with his parents, guardian, or other custodian, subject to conditions and limitations as the court prescribes, including supervision as directed by the court for the protection of the child.
>
> (2) Subject to conditions and limitations as the court prescribes transfer temporary legal custody to any of the following:
>
> (i) Any individual resident within or without this Commonwealth who, after study by the

> probation officer or other person or agency designated by the court, is found by the court to be qualified to receive and care for the child.
>
> (ii) An agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child.
>
> (iii) A public agency authorized by law to receive and provide care for the child.

Id. In ***In Re Tameka M.***, 525 Pa. 348, 580 A.2d 750 (1990), our Supreme Court construed section 6351 as follows:

> The Juvenile Court maintains a *continuing plenary jurisdiction* in dependency cases under 42 Pa.C.S.A. § 6351 . . .and has the power to review the circumstances of dependent juveniles and to question both the legal custodian, CYS, and the foster parents concerning the condition and the needs of the dependent child.
>
> . . .
>
> [Instantly], Juvenile Court acquired *continuing* jurisdiction under section 6351(a)(2) once that court found Tameka M. to be a dependent child.

Id. At ___, 580 A.2d at 752 (emphasis added). Similarly, we find that Juvenile Court acquired continuing jurisdiction under section 6351(a) when it adjudicated Byron and Byrae Griffin dependent.

Were we to accept appellants' argument that Juvenile Court is deprived of jurisdiction once an appeal of any aspect of a dependency action is filed, we would render the court powerless to prevent any abuse, no matter how egregious, of a dependent child at the hands of his custodian. Most dependency actions, and especially those as prolonged as the one currently at issue, involve a variety of issues, parties and Orders of court. A holding that deprives Juvenile Court of jurisdiction merely because a single Order, involving any issue or party, has been appealed would not only defy logic, but it would also frustrate the statutory authority of Juvenile Court to exercise continuing independent and original authority to adjudicate in the best interests of a dependent child. *See* ***In Re Lowry***, 506 Pa. 121, __, 484 A.2d 383, 386 (1984) ("[Juvenile Court] acts pursuant to a separate discretionary role with a purpose of meeting the child's best interests.").

Secondly, appellees claim appellants lack standing to pursue the instant appeal. They base this claim on our

recent en banc decision in ***In the Interest of G.C.***, 449 Pa. Super 258, 673 A.2d 932 (1996). In ***G.C.***, this Court held:

> [B]ecause foster parents have neither permanent custody of their foster children nor an expectation of permanent custody, the decision of a legal custodian regarding custody does not cause the type of direct and substantial injury necessary for standing.

Id. At __, 673 A.2d at 939. According the appellees, since appellants are foster parents, ***G.C.*** deprives them of standing to challenge Juvenile Court's removal Order.

Initially, we note that while seven of eight judges in ***G.C.*** agreed that a remand for further proceedings was necessary, the Court split evenly on the issue of standing. Thus, while the Opinion operated to affirm the trial court's determination of standing, it has no precendential authority. *See* ***Chesler v. Govt. Employees Ins. Co.***, 302 Pa. Super. 356, 360, 448 A.2d 1080, 1082 (1982) (recognizing that a split decision "carries no weight as precedent."). Of course, the split decision in ***G.C.*** also left standing existing law, which had repeatedly denied

standing to foster parents in a variety of circumstances. *See e.g.*, ***In re: Adoption of S.C.P.***, 364 Pa. Super. 257, 527 A.2d 1052 (1987) (foster parents lack standing to pursue custody of former foster children); ***Priester v. Fayette County Children and Youth Services (CYS)***, 354 Pa. Super. 562, 512 A.2d 683 (1986) (foster parents lack standing to seek custody of foster child removed from their home); ***In re Adoption of Crystal D.R.***, 331 Pa. Super. 501, 480 A.2d 1146 (1984) (foster parents lack standing to file for termination of parental rights). However, the facts of this case are somewhat different from those in which foster parents traditionally have been denied standing.

Specifically, although appellants were designated as foster parents at the time of Byron's initial placement on July 21, 1992, it is clear that their status ultimately changed. At least as early as December 17, 1992, when Juvenile Court directed CYS to assist appellants in adopting Byron, appellants were considered prospective

adoptive parents. The court's Order of July 14, 1995 also indicates:

> "This court, at this time, is satisfied that [appellants] are appropriate prospective adoptive parents[.]

(Order, 7/14/95, R. 372b.) See also Slip Op. At 1 ("Karen and Michael Dezack [are] the proposed adoptive parents of Byron Todd Griffin . . .and his sister, Byrae Lafay Griffin[.]").

On the issue of standing, this change in appellants' designation is critical. As this Court explained in, ***Mitch v. Bucks County Children and Youth Social Service Agency,*** 383 Pa. Super. 42, 556 A.2d 419 (1989):

> "[P']rospective adoptive parents, unlike foster parents, have an expectation of permanent custody which, though it may be contingent upon the agency's ultimate approval, is nevertheless genuine and reasonable. Because of this expectation of permanency, prospective adoptive parents are encouraged to form emotional bonds with the child from the first day of placement. By removing the child from the care of the prospective adoptive parents, the agency forecloses the possibility of adoption. In light of the expectation of permanent custody that attends an adoptive placement, an agency's decision to remove a child constitutes a direct and substantial injury to prospective adoptive parents. Because

> prospective adoptive parents, unlike foster parents, suffer a direct and substantial injury when an agency removes a child from them, we see no reason in law or policy why we should limit their standing to sue for custody.

Id. At __, 556 A.2d at 423.[4] A recent panel of this Court also recognized the standing of prospective adoptive parents in dependency and custody actions. *See* ***Mollander v. Chiodo***, ___ Pa. Super. ___, ___, 675 A.2d 753, 757 (1996), *citing* ***In re: Baby Boy S.***, 420 Pa. Super. 35, 43, 615 A.2d 1355, 1357-1358 (1995), *aff'd Per Curiam,* 540 Pa. 302, 657 A.2d 484 (1995) ("Standing. . .has also been found in prospective adoptive parents who received custody from an agency[.]"). On this basis, we reject appellees' claim that appellants lack standing to pursue the instant appeal.

The third claim we must address before turning to the merits of this appeal is that the contempt proceedings were conducted in violation of appellants' due process

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[4] ***In the Interest of G.C.,*** __ Pa. Super. ___, 673 A.2d 932 (1996), also noted the importance of the fact that "Mitch involved prospective adoptive parents rather than . . .foster parents[.]" Id. At ___, 673 A.2d at 934.

rights. Specifically, appellants claim they "had neither notice that their children might be taken from them as a result of the contempt proceedings nor did they have motivation to prepare a defense to removal." (Appellants' brief at 39.) We reject this claim.

Initially, we reiterate that appellants first entered this case as foster parents. As we noted in ***G.C.***, "When foster parents enter into their relationship with the child, they know. . .that the agency has the authority to remove the child[.]" ***In the Interest of G.C.***, supra at ___, 673 A.2d at 936 (emphasis in original), *citing* ***In re: Adoption of Crystal D.R.***, 331 Pa. Super. 501, 509-510, 480 A.2d 1146, 1150-51 (1984). Thus, from the very beginning, appellants were on notice that the children could be removed at any time. Moreover, even after entry of the December 17, 1992 Order directing CYS to assist appellants in adopting Byron, which first recognized appellants as prospective adoptive parents, the record indicates that appellants knew or should have known of the court's authority to Order removal. Of particular note

is the Order of December 20, 1993, which removed Byron from the custody of appellants for the purpose of reuniting him with his mother. Rather than challenging this Order on due process grounds, appellants created a media spectacle, as they had done before, to prevent Byron's removal. Nonetheless, Byron was removed on December 27, 1993. Since this removal occurred more than one year after appellants were identified as prospective adoptive parents, their claim that they were unaware that removal was an option available to Juvenile Court is dubious.

Further, no less than four contempt petitions were filed against appellants between July of 1995 and the December 13, 1995 hearing date. These pleadings clearly put them on notice of the subject of the contempt hearings and they do not contend otherwise. Instead, they claim only that they were unaware that removal could result. During their extensive involvement in this case, appellants have attended numerous hearings. They were clearly aware, and do not deny, that determining the best

interests of the children was the ultimate goal of every single hearing. As appellants were also aware, several of these hearings resulted in removal Orders. In fact, appellants have seen the children moved, by court Order, from their home to the home of relatives, and from residential placement with their mother back to appellants' home. No notice explicitly providing that removal was an option was provided before any of these hearings. This was so because all parties understood at all times that the broad authority of Juvenile Court to adjudicate in the best interests of dependent children includes the power of removal. Without that power, Juvenile Court's authority would be illusory. Finally, as a matter of common sense, it appears doubtful that appellants were truly under the impression that removal could not result regardless of the number and types of contempt they committed. In light of these facts we are convinced that appellants were on notice that removal could result from the hearings of December 13, 1995 and January 17, 1996.[5]

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[5] Of course, our conclusion that appellants had notice that

As the transcripts indicate, both appellants presented extensive testimony and were represented by competent counsel throughout the contempt proceedings. They were provided every opportunity to explain or defend their conduct. Having failed to do so adequately, appellants cannot now complaint that they were unaware of the intended purpose of the contempt hearings or that they were denied the opportunity to be heard. Having rejected appellants' due process challenge, we proceed to the substantive issues presented by this appeal.

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removal could result from the hearing of December 13, 1995 also means that they had notice that removal could result from the hearing a month later, on January 17, 1996. At any rate, removal was discussed extensively at the conclusion of the hearing of December 13. For instance, Judge Baer stated:

> The $64,000 question is whether this record, or this record coupled with what's been heard before by Judge Jaffe, would lead us to believe that it's not in the best interest of these kids to be in this home and, if so, they should be removed[,] and if not, they should be left there.

(N.T., 12/13/95, pp. 161-162.) Thus, any claim that appellants were not aware that removal was being considered, at least by the hearing of January 17, 1996, is not credible. Finally, it is interesting to note that at the December 13 hearing appellants' counsel, rather than expressing surprise that removal was an option, argued that removal "would certainly not be in the best interests of the children." (N.T. at 161.)

Specifically, appellants claim "the decision to remove Byron and Byrae from the Derzack home was based on gross misrepresentations and conclusions concerning the Derzacks conduct and was manifestly unreasonable[.]" (Appellants' brief at 19.) A review of appellants' discussion of this issue reveals that, in reality, they are asserting two claims. First, appellants allege an abuse of discretion in the Juvenile Court's "findings that the Derzacks violated court orders for conduct which had been pre-approved by the court, court orders which did not exist at the time of the conduct in question and court orders which the Derzacks had no way of knowing about." (Appellants' brief at 20.) Appellants also claim "to the extent that violations had occurred, none warranted removal of the children from their home[.]" ***Id.*** Notwithstanding their apparent concession "that violations had occurred", we will address appellants' claim that they did not knowingly violate any Orders of court.

Initially, we note our standard of review:

> It is of course true that our paramount concern in child custody cases is to determine the best interests of the child. Thus, appellate review of child custody Orders is of the broadest type, and we may modify the trial court's custody determination where it is shown by evidence of record to be manifestly unreasonable[.] Further, our review is not bound by the trial court's deductions, inferences and interpretations of evidence and we will exercise independent judgment to consider the merits of the case and to enter an order that is correct and just.

In Interest of G.C., supra at ___, 673 A.2d at 943 (citations omitted).

> However, this broad scope of review does not vest in the reviewing court the duty or the privilege of making its own independent determination. Thus an appellate court is empowered to determine whether the trial court's incontrovertible factual findings support its factual conclusions, but it may not interfere with those conclusions unless they are unreasonable in view of the trial court's factual findings; and thus, represent a gross abuse of discretion.

McMillen v. McMillen, 529 Pa. 198, ___, 602 A.2d 845, 847 (1992) citations omitted.

Applying this standard of review to the record before us, we find no error in Juvenile Court's conclusion that appellants were in contempt of court. In order to maximize the clarity of this analysis, the Orders at issue in

this appeal are summarized as follows and the acts of appellants which violated these Orders are then addressed seriatim:

1. Order of October 5, 1994; requiring, inter alia, "consent for the child to travel out of the jurisdiction[.]" (R. 361b)

2. Order of October 6, 1994; requiring "significant follow-up services. . .including but not limited to in-home services and mental health counseling" and authorizing CYS supervised visits by mother, paternal grandmother and siblings. (R. 363-364b.)

3. Order of November 14, 1994; requiring "that parties are to have no contact with the public vis-a-vis discussing or referring to this case in any public context or forum." (R. 365b.)

4. Two Orders dated April 12, 1995; requiring sibling visitation "every other Wednesday from 4:00 p.m. until 6:00 p.m." and visitation by the children's paternal grandmother, Flora Griffin Shapiro "every other Tuesday from 3:30 p.m. until 7:30 p.m." (R. 368b.)

5. Order of May 9, 1995; requiring that CYS "arrange for therapeutic intervention and counseling for Byron and Byrae, and for an evaluation of the effect of the visitations on Byron and Byrae" and directing CYS "to make announced and unannounced visits" at the Derzack home. (R. 370b.)

6. Order of July 14, 1995; requiring appellants to correct their adoption/foster care application and adoption petition to reflect appellant/wife's previous

psychiatric history and to provide proof of appellants' annual income for the previous five years. (R. 372b.)

7. Order of August 14, 1995; stating "specifically, Michael and Karen Dezack are not permitted to observe, attend or participate in [sibling] visits." (R. 373b.)

8. Order of October 13, 1995; requiring appellants to permit announced and unannounced home visits with the children by CYS caseworker. (R. 375b.)

TRAVEL OUTSIDE OF ALLEGHENY COUNTY

Juvenile Court found a violation of the October 5, 1994 contempt Order based on appellants' "travel with Byron and Byrae to California and New York to tape television programs without written permission from CYS or consent of court to travel outside of Allegheny County." (Slip Op. At 22.) Initially, appellants claim they were unaware "that the October 5, 1994 Order existed prior to the contempt hearing of December 13, 1995." (Appellants' brief at 21.) Appellants also refer to the Order as the "purported Order", ***id.***, and state that they are "left wondering about the origins of the October 5 order", ***id.*** At 23. Nonetheless, our review of the certified copy of

docket entries in this case reveals that the "purported" Order was filed with the prothonotary on the date it was issued. In the absence of an allegation that the Order was somehow filed in error, we do not share appellant's concerns about the "origins of the October 5 order".

Appellants also claim they were never informed by CYS that permission was required before the children were taken outside of Allegheny County. Likewise, they claim they never received the CYS foster care manual, which expressly states that permission is required before foster children may leave the jurisdiction. The record belies appellants' contention that they were unaware of the permission requirement. For instance, at the December 13, 1995 contempt hearing, counsel for CYS entered into evidence a vacation permission form, identified as Exhibit N, which had been filed by appellants on June 1, 1995 (N.T., 12/13/95, p. 50). The form indicates that appellants had sought and received permission from CYS to take Byrae on vacation from June 8 through June 12, 1995. In light of this form, it is clear

that appellants knew of the requirement that they seek permission prior to taking the children out of Allegheny County.

The date on which appellants sought permission to take Byrae on vacation is also relevant in light of the dates on which Juvenile Court found violations of the October 5, 1994 Order. For instance, the court found that appellants had violated the Order by traveling, with the children, to California on November 9, 1995 in order to tape the nationally televised talk show "Leeza". Thus, more than five months after appellants filed the form of June 1, 1995, thereby manifesting awareness of the permission requirement, they traveled with the children to California without requesting permission to do so.

Moreover, because the children also appeared on camera during the taping of the "Leeza" show, appellants cannot and do not deny that they took the children to California. Instead, they gloss over this violation and argue only that they did not also take the children to New York to tape another talk show. However, a finding of

contempt is not dependent upon the number of times a court Order is violated, and we find no abuse of discretion in the Juvenile Court's conclusion that appellants violated the Order of October 5, 1994, when they admittedly traveled with the children to California.

Finally, in considering appellants' denial that they also took the children to New York, we note that the testimony of both appellants, as a general matter, was deemed incredible by Juvenile Court. For instance, the court states that on numerous occasions, Mrs. Derzack's testimony was contrary to "the undisputable evidence presented at the hearing" (Slip Op. At 13), and "both Karen Derzack and Michael Derzack further attempted to ridicule the court by being coy and evasive when responding to questions asked during cross-examination." (Slip Op. At 16.)[6] In a separate Opinion in support of the court's determination, Judge Jaffe also states:

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[6]For example, Mrs. Derzack testified as follows:

> Beyond the violations of the Court Orders, I was astonished by the deceit and boldness exhibited by both Karen and Michael Derzack during their testimony at the hearing. Both repeatedly either flatly denied violating the Orders or claimed a lack of recollection of the events when faced with indisputable evidence of the violations.

(Slip Op., Jaffe, J., 4/1/96, p. 5.) Particularly in light of this adverse credibility determination, we find appellants' bald denial that they took the children to New York an

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Q. [COUNSEL FOR CYS]: You admit that you failed to request permission of CYS or this Court to go to California to tape the Leeza Show?

A. I do not admit that.

Q. Did you ask permission?

A. From?

Q. From CYS or this Court to go tape the Leeza show in California?

A. No, I do (sic) not.

Q. But yet you don't consider that a violation of Court Orders in this case?

A. I did not violate any Court Order.

(N.T., 12/13/95, p. 113.)

insufficient basis upon which to conclude the that Juvenile Court abused its discretion.[7]

TERMINATION OF FAMILY VISITATION

Juvenile Court determined that appellants had violated the Orders of October 6, 1994, April 12, 1995 and August 14, 1995 by unilaterally terminating court-ordered visitation by the children's mother, siblings, paternal grandmother and maternal great aunt. In their brief, appellants concede that "[t]he record reflects that the Derzacks, at some point in time, did not comply with the family visitation orders." (Appellants' brief at 33.) However, they claim "[t]he record also reflects that in failing to facilitate with visits, the Derzacks were following

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[7] We also note that Juvenile Court "[took] judicial notice of Byron and Byrae's appearance on camera on at least three. . .televised talk shows." (Slip Op. At 12.) Although neither the Opinion nor the record disclose specifically which talk shows this statement references, it is clear that none of the shows discussed by the court originate in Allegheny County. Unless all of the relevant segments were taped in this county, which appears unlikely and is not claimed by appellants, the court may well have found additional violations of the October 5, 1994 Order. At any rate, in light of appellants' admission that they travelled with the children to California to tape "Leeza", there is no question that appellants were properly found in contempt of the Order prohibiting such travel.

their [former] attorney's instructions and his advice that they were not required to permit visits." *Id.* Initially, we note that our thorough review of the testimony presented by appellants at the contempt hearings indicates that they did not raise this "defense" prior to the instant appeal. In fact, at the December 13, 1995 contempt hearing, Mr. Derzack testified as follows:

> Q. [COUNSEL FOR MARION ELLIS, the children's great aunt]: [T]his is part and parcel of the reason why you and your wife unilaterally decided not to adhere to the visitation order?
>
> A. I don't think that we ever violated the visitation order.
>
> Q. There hasn't been a visit since August [1995]; is that correct?
>
> A. I felt that Judge Jaffe had canceled those visits.

(N.T., 12/13/95, p. 140.) Therefore, rather than claiming appellants had terminated visitation on the advice of counsel, Mr. Derzack stated his belief that visitation had been "canceled". Appellants have not offered a shred of evidence either explaining or substantiating this belief. Mrs. Derzack also testified as to visitation:

Q. Mrs. Derzack, you are certainly aware of the various orders that have been entered by Judge Jaffe concerning the sibling visits between Byron and Byrae, are you not?

A. Yes.

Q. In fact, visits occurred up until some point in August of 1995; is that correct?

A. I don't remember dates, but yes.

Q. Do you intend to allow visits to occur in the future, or is it your belief that, as you just indicated, you don't think that Judge Jaffe had the authority to enter those orders?

A. I can't speak for the future.

(N.T. at 124-125.) Thus, rather than claiming that she terminated visitation on the advice of counsel, Mrs. Derzack defiantly asserted the possibility that she would disobey future visitation Orders.

As this testimony indicates, appellants' claim that they were relying on the advice of counsel in discontinuing visitation has been raised for the first time on appeal and, for this reason, we may not consider it. *See* ***In re D.D.***, 409 Pa. Super. 35, 597 A.2d 648, 654-655 (1991) ("The issue was not raised and properly preserved on the record

in the Juvenile Court and is therefor[e] waived. It cannot be raised for the first time on appeal."); Pa.R.A.P. 302 ("**Rule 302. Requisites for Reviewable Issue (1) General rule**. Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). A party violates court Orders at his peril and we will not recognize appellants' tardy attempt to blame former counsel.[8] The Orders of October 6, 1994, April 12, 1995 and August 14, 1995 clearly provide for visitation and appellants admit that they "did not comply" with these Orders. In light of this admission, and having rejected appellants' sole alleged defense, we find no error in Juvenile Court's determination that appellants were in

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[8]We note that appellants' hearing counsel expressly denied that he directed his clients to disobey the visitation Order. Following Mrs. Derzack's statement that she "can't speak for the future", the following exchange occurred:

> Q. [JUDGE CRAIG]: Not to give you a hard time, Mr. Bloom, but your client seems to be saying to me that she can't speak to whether she's going to comply with any Orders--
>
> . . .
>
> A. [APPELLANTS' COUNSEL]: I understand, but that would not be my direction to my client, Judge.

contempt of the visitation Orders of October 6, 1994, April 12, 1995 and August 14, 1995.

TERMINATION OF THERAPY AND COUNSELING

Juvenile Court found that "in contravention to [the] Orders of October 6, 1994 and May 9, 1995, the Derzacks failed or refused to take the children to a mental health professional . . .As with the visitation privileges, the Derzacks cancelled or failed to schedule appointments with Dr. [Debra] Klosterman between July 1995 and October 12, 1995." (Slip Op. At 22.) Despite the court's finding that there were no therapy sessions between "July 1995 and October 12, 1995", appellants claim that "through their own efforts, [they] scheduled about seven sessions with Dr. Klosterman through October 12, 1995." (Appellants' brief at 34.) Once again, the record belies appellants' assertion. In fact, at the hearing of December 13, 1995, Mrs. Derzack testified:

> Q. [COUNSEL FOR THE CHILDREN]: You were aware, were you not, that neither Byron nor Byrae

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(N.T. at 160.)

was receiving any therapy since this summer at least?

A. They haven't been since I've not taken them.

Q. And nobody else has had them outside of your custody that would be taking them either; is that correct?

A. Correct.

(N.T. at 120.) Thus, despite the present claim to the contrary, Mrs. Derzack admitted at the hearing of December 13, 1995 that "neither Byron nor Byrae was receiving any therapy since [the] summer [of 1995]."

Further, CYS caseworker Timothy Jashinski testified:

Q. [COUNSEL FOR CYS]: [A]t some point did the Derzacks abruptly terminate the therapy for Byron and Byrae?

A. Yes. The therapy was terminated after Debbie Klosterman met with the Law Department.

Q. And why did she meet with the Law Department?

A. The Law Department wanted to go over what was necessary for her to accomplish during these evaluations.

Q. Do you know whether Children & Youth Services had been Ordered to pay for Dr. Klosterman?

A. Yes. On this Court Order of May 9th it Orders CYS to pay.

Q. And you were at that meeting; is that correct, Mr. Jashinski?

A. With Debbie Klosterman? Yes, I was.

Q. And the purpose of that meeting was to hire Dr. Klosterman and pay her for her services; is that correct?

A. Yes.

Q. And you're stating that it was after this meeting that Mr. And Mrs. Derzack abruptly canceled the children's therapy; is that right?

A. Yes.

Q. And was that back sometime in July of 1995?

A. Yes.

Q. Were they given permission to do this?

A. To stop the therapy?

Q. To stop the therapy.

A. No.

Q. Was that a violation of this Court's Order?

A. Yes.

(N.T. at 40-41.) Mr. Jashinski's testimony, in addition to the admission of Mrs. Derzack, indicates that appellants unilaterally terminated court-ordered therapy in July 1995.

This may well have been the most egregious of the many acts of contempt committed by appellants. At all times, appellants were fully aware of the extremely traumatic background of Byron and Byrae. Both appellants also testified at the hearing of December 13, 1995 that they believed Byrae had been sexually molested (N.T. at 118 (Mrs. Derzack), 134 (Mr. Derzack)). Nonetheless, appellants prevented the children from receiving the professional help they so desperately and obviously needed.

Finally, although appellants admit that "[n]o visits were scheduled between mid-October and December" (appellants' brief at 35), they attempt to justify this failure on the basis that they "were extremely uncomfortable with the situation after CYS had directed Dr. Klosterman to exclude them as recipients of her reports." ***Id***. As this statement indicates, appellants placed their own desires,

and their disdain for CYS, over the needs of the children. We reiterate that the Legislature has vested Juvenile Court, rather than appellants, with the ultimate authority to adjudicate in the best interests of dependent children. It is simply irrelevant that appellants became "uncomfortable" with the court's exercise of that authority. Having ignored this principle, appellants were properly found in contempt of the Orders of October 6, 1994 and May 9, 1995.

EXPOSURE OF THE CHILDREN TO PUBLICITY

Juvenile Court found that appellants had repeatedly conducted media interviews and appeared on national talk shows in violation of the prohibition of the November 14, 1994 "Gag" Order "that parties are to have no contact with the public vis a vis discussing or referring to this case in any public context or forum." Order, 11/14/94, p. 365b.[9] Specifically, the court found that appellants had discussed the case on numerous nationally televised talk shows, including "Rikki Lake", "Montel

[9] This Order was vacated on May 21, 1996, after appellants lost custody of the children.

Williams", "Sally Jesse Raphael" and "Leeza". (Slip Op. At 23.)

In a pattern of argument which is by now familiar, appellants claim that they did not violate the Order as many times as Juvenile Court determined. Specifically, they claim that taping of the "Rikki Lake' show preceded the effective date of the gag Order.[10] Appellants do not discuss, and thus do not contest, that they appeared on the remaining shows cited by Juvenile Court. Instead, they claim the gag Order is an unconstitutional restriction on free speech. However, we note that appellants have never challenged the Order of November 14, 1994 on appeal, much less within 30 days as required by Pa.R.A.P.

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[10] Appellants also claim they had the permission of Judge Jaffe to appear on the "The Maury Povich Show" on October 20, 1994. In the section of its Opinion setting forth the relevant facts, Juvenile Court notes that this appearance violated the Order of January 24, 1994 (Slip Op. At 10), which preceded the gag Order of November 14, 1994. However, the Order of January 24, 1994 was not one of the eight Orders relied upon by Juvenile Court to find appellants in contempt of court. Thus, whether or not appellants violated the Order of January 24, 1994 is irrelevant to the instant appeal, and we need not consider appellants' claim that they had permission to appear on "The Maury Povich Show."

903. Further, the issue of constitutionality was raised neither in a motion to reconsider the Juvenile Court's contempt Order of January 17, 1996 nor in appellants' statement of matters complained of on appeal. In fact, our thorough review of the entire record before us reveals that the alleged unconstitutionality of the Order of November 14, 1994 was never raised, or even contemplated, at any stage of this litigation.

At any rate, it is appellants' responsibility to demonstrate, with relevant citations to the record, that this issue has been preserved. For instance, Pa.R.A.P. 2117(c) provides:

> **Rule 2117. Statement of the Case**
>
> (c) Statement of place of raising or preservation of issues. Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the statement of the case shall also specify:
>
> (1) The state of the proceedings in the court of first instance, and in any appellate court below, at which, and the manner in which, the questions sought to be reviewed were raised.

(2) The method of raising them (e.g. by a pleading, by a request to charge and exceptions, etc.).

(3) The way in which they were passed upon by the court.

(4) Such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g. ruling or exceptions thereto, etc.) as will show that the question was timely and properly raised below so as to preserve the question on appeal.

Id. Further, Pa.R.A.P. 2119(e) provides:

Rule 2119. Argument

(e) Statement of place of raising or preservation of issues. Where under the applicable law an issue is not reviewable on appeal unless raised or preserved below, the argument must set forth, in immediate connection therewith or in a footnote thereto, either a specific cross reference to the page or pages of the statement of the case which set forth the information relating thereto required pursuant to Rule 2117(c) (statement of place of raising or preservation of issues), or substantially the same information.

Id.

In characteristic fashion, appellants make no effort to comply with the mandate of these rules. Instead, in a one paragraph argument, they direct our attention to

Pa.R.C.P. 1930.2(a) (Appellants" reply brief at 4). The Rule provides:

> **Rule 1930.2 No Post-Trial Practice. Motions for Reconsideration**
>
> (a) There shall be no motion for post-trial relief in any domestic relations matter except that where a paternity matter is tried by jury, post trial practice shall be permitted in accordance with Rule of Civil Procedure 227.1.

Id.

From this rule abrogating the need for post-trial motions in domestic relations matters, appellants apparently extract the principle that an issue which was never presented at trial can be advanced on appeal. This is patently false. See Pa.R.A.P. 302, *supra* ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."); ***In re D.D.***, *supra* at ___, 597 A.2d at 654-655 ("The issue was not raised and properly preserved on the record in the Juvenile Court and is therefore waived. It cannot be raised for the first time on appeal."); ***In re Frederick F.***, 400 Pa. Super. 542 N. 7, 583 A.2d 1248, 1250 n. 7 (1990) (issue not raised in

Juvenile Court deemed waived on appeal). Rather than challenging the Order of November 14, 1994 in compliance with the rules of appellate procedure, appellants have instead violated it in an arrogant fashion and now seek to nullify the consequences of the violations by challenging the constitutionality of the Order for the first time on appeal. We will not allow such brazen disregard of court Orders and rules of court. Appellants' challenge to the constitutionality of the Order of November 14, 1994 is waived. ***Commonwealth v. Hawkins***, 295 Pa. Super. 429, __ n. 6, 441 A.2d 1308, 1312 n. 6 (1982) ("[I]ssues, even those of constitutional dimension, cannot be raised for the first time on appeal[.]).[11] In a more fundamental

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[11] On several occasions, appellants' brief refers to a federal lawsuit, *Focus v. Allegheny County Court of Common Pleas*, Civil Action No. 94-2160 (W.D. Pa.), filed on June 7, 1994, by the appellants' current counsel, acting for the American Civil Liberties Union and on behalf of "a community group interested in juvenile court proceedings" (Appellants brief at 6). Neither appellants nor CYS were parties to the action, which challenged the constitutionality of the gag Orders predating the Order of November 1, 1994. Although we have been provided only with the caption of the case, our review indicates that it was dismissed by Federal District Court on Eleventh Amendment grounds and for lack of subject matter jurisdiction. Thereafter, the Third Circuit Court of Appeals reversed and remanded on

procedural and jurisdictional grounds. ***Focus v. Allegheny County Court of Common Pleas***, 75 F.3d 834 (3d Cir. 1996). However, the parties apparently settled the case before remand proceedings could be held. Thus, Focus' constitutional challenge to the gag Orders was never adjudicated.

While the parties agree that the gag Order of November 14, 1994 was vacated on May 21, 1996, they disagree on the import of the federal litigation. Appellants claim "[t]he November 14, 1994 gag Order was finally vacated on May 21, 1996 as part of the resolution of the federal lawsuit filed by Focus[.]" (Appellants' brief at 10.) Appellee/children claim "[t]he Order in question was vacated by Judge Jaffe in the Court of Common Pleas at the request of counsel for the minor children. . .since the parties who had been guilty of harming the children by relentless publicity-seeking, namely the Derzacks and to a lesser extent the family members, were no longer formal parties to the case since the children had been removed from the Derzacks and the mother's parental rights were terminated. Since the Order had been vacated the federal District Court action was settled, being moot." (Appellee's brief at 3-4.) Neither Juvenile Court Opinion discloses whether the Order of November 14, 1994 was vacated on May 21, 1996 as a result of "the resolution of the federal lawsuit", or because the issue of publicity was moot, the children having been removed from the appellants. However, even assuming the accuracy of appellants' contention, we can discern no relevance of the federal action to the instant appeal. Initially, the Third Circuit confirmed the fact that "neither party to the Baby Byron case is on record as being opposed to the gag orders." ***Focus***, 75 F.3d at 839. Since the federal action did not involve the parties to the instant case, it did not preserve appellants' current challenge to the Order's constitutionality. As noted, appellants have violated Rules of Appellate Procedure 302, 2117(c) and 2119(c), relating to the preservation of issues, and we are aware of no authority, nor do appellants cite any, indicating that a federal lawsuit filed by unrelated plaintiffs can cure the waiver of an issue by parties to a state proceeding. Finally, since the federal lawsuit was never resolved on the merits, we are not confronted by an Order which has been found by a federal court to violate the United States Constitution.

manner, it is evident that Rule 1930.2 (relating to post-trial matters in domestic relations cases), as relied upon by appellants, does not apply in Juvenile Court proceedings, which are governed entirely by 42 Pa.C.S. § 6301 *et seq.* *See* ***In re Gorham***, 272 Pa. Super. 145, 148, 414 A.2d 712, 713 (1979) ("[A] juvenile proceeding is not 'a matter subject to the Pennsylvania Rules of Civil Procedure'."); and ***Commonwealth v. Clay***, 376 Pa. Super. 425, 429, 546 A.2d 101, 103 (1988) ("[T]he procedures for post-trial review contained in the Pennsylvania Rules of Civil Procedure do not apply to juvenile proceedings unless specifically provided otherwise.").[12]

As to whether appellants actually violated the Order of November 14, 1994, the record again reveals evasive testimony. For instance, Mrs. Derzack testified:

Q. [COUNSEL FOR CYS]: With regard to the Gag Order, it's also my understanding that you have appeared on the Rikki Lake Show; is that correct?

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[12] Although neither the Rules of Civil Procedure nor the Rules of Criminal Procedure apply to Juvenile Court, the Rules of Appellate Procedure do apply to appeals from that court, as indicated by the prior citations.

A. Yes.

Q. And you've appeared on the Montel Williams Show, is that correct?

A. Yes.

Q. You admit you appeared on Sally Jesse Raphael, is that right?

A. Yes.

Q. And you also admit that you've appeared on the Leeza Show?

A. Yes.

. . .

Q. Do you admit that you violated this Court's Gag Order with regard to your appearances on Rikki Lake and Montel Williams and Leeza?

A. Do I admit I violated them?

Q. Yes.

A. No, I do not.

(N.T. at 111-112.)

Q. Did you talk about Byron and Byrae on the Leeza Gibbons Show

A. Yes, in genera.

Q. What did you talk about?

A. I don't remember specifics.

Q. Do you know in general what you talked about?

A. To be honest with you, no, I do not.

Q. So you don't remember anything at all that you said on the Leeza Gibbons show that you just taped on November 9th [1995]. That what you're asking us to believe?

A. I don't remember.

Q. You don't remembers whether you remember?

A. I don't remember anything that I talked about there.

(N.T. at 123.) Similarly, Mr. Derzack testified as follows:

Q. [COUNSEL FOR THE CHILDREN]: Did you hear your wife talk about the talk shows that she's spoken about during her testimony? Were you present also?

A. In some instances.

Q. Which ones were you there for?

A. Rikki Lake, Montel Williams, and Leeza Gibbons.

Q. Did you appear on camera on any of those shows?

A. Yes.

Q. Which ones?

A. All three.

Q. Did you talk about Byron and Byrae on any of those shows?

A. The Montel Williams show, no. The Rikki Lake, it was several years ago. On the Leeza Gibbons show, I don't recall mentioning their names.

Q. Did you talk about them?

A. I really don't recall lights, cameras.

(N.T. at 135.) Therefore, although "Leeza" was taped less than five weeks prior to the December 13, 1995 hearing, neither appellant could recall anything that was discussed. Nonetheless, despite a final attempt at evasion, Mr. Derzack ultimately relented:

Q. [COUNSEL FOR THE CHILDREN]: Have you violated the Court's prohibition against referring to or discussing the case in any public forum?

A. I don't know how to best answer that, other than to say--

Q. Try yes or no.

A. There's nothing in between? If you read it by the letter of the law and if that law is enforceable, then, yes, we have violated the Order.

(N.T. at 137.)

In light of this admission, and our rejection of appellants' attack upon the constitutionality of the "gag"

Order, it is clear the Juvenile Court was correct in finding that appellants had repeatedly violated the Order.

TERMINATION OF CYS VISITATION

Juvenile Court found that appellants had violated the Orders of May 9 and October 13, 1995 by refusing to permit announced and unannounced visits by CYS.[13] At the December 13, 1995 contempt hearing, CYS caseworker Timothy Jashinski testified as follows:

Q. [COUNSEL FOR CYS]: Just to clarify, up until around August of 1995 you were making regular visits; is that right?

A. Yes.

Q. And then for some reason during this particular time in August and then in September [appellants] stated they were in loco parentis and that you weren't allowed to visit; is that right?

A. Right.

(N.T. at 15.)

. . .

Q. Did you attempt to visit the Derzack residence after the issuance of the October 13, 1995 Order?

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[13] The Order of October 13, 1995, which reaffirmed the mandate of the Order of May 9, 1995, was entered in response to a contempt petition filed by CYS after appellants failed to comply with the former Order.

A. Yes, I did.

. . .

Q. Was Mrs. Derzack friendly to you when you came to the door?

A. I wouldn't say friendly, no.

Q. So she ushered you in, and then what happened?

. . .

A. I was at the bottom in the entrance of the house. I said hello to the kids. The kids said hi to me. I asked them how they were doing. They said fine. Then I proceeded—Mr. Derzack had mentioned something about them going to a Halloween party, so I just asked them, you know, if they were ready for trick or treating or what they were going to be, and then Mrs. Derzack abruptly ended the visit.

(N.T. at 17-18.)

As with their claim regarding family visitation, appellants claim they terminated CYS visitation "Only after their [former] attorney advised them that they were in loco parentis and that visits were no longer permitted." (Appellants' brief at 34.) Once again, this claim is contrary to the hearing testimony and is presented for the first time on appeal. For instance, Mrs. Derzack testified as follows:

Q. [COUNSEL FOR CYS]: You admit that you refused to alow Mr. Jashinski access to Byron and Byrae?

A. No.

Q. You're denying that?

A. Yes.

Q. You deny that you ordered Mr. Jashinski from your home on October 27, 1995?

A. I deny that.

. . .

Q. Going back to Mr. Jashinski's visits, do you deny that you violated this Court's Order with regard to those visits?

A. I did not go against the Court Order. I deny that.

(N.T. at 111).

As this testimony indicates, rather than claiming appellants violated the Orders of May 9 and October 13, 1995 on the advice of counsel, Mrs. Derzack flatly denied that she refused visitation or violated the Orders.[14] As

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[14]Mrs. Derzack did, however, question the authority of Juvenile Court to order visitation. She testified:

such, Mrs. Derzack's testimony directly contradicted that of Mr. Jashinski and the credibility of these witnesses was a matter for Juvenile Court, as finder of fact. ***Commonwealth v. Lawson***, 437 Pa. Super. 521, 650 A.2d 876 (1994), appeal denied, 540 Pa. 596, 655 A.2d 985 (1995). Particularly in light of the express finding that appellants' testimony was incredible, we find no error in the court's decision to credit Mr. Jashinski's testimony. Accordingly, we perceive no abuse of discretion in Juvenile Court's conclusion that appellants violated the visitation Orders of May 9 and October 13, 1995.

REFUSAL TO CORRECT ADOPTION APPLICATION

Q. [COUNSEL FOR CYS]: [D]oes [Judge Jaffe] have the right to Order Mr. Jashinski to visit your home to interview Byron and Byrae?

A. I don't know.

Q. So I guess what you're saying is you don't know whether Judge Jaffee has the right to enter any Order in this case; is that right?

A. I don't know.

(N.T., 12/13/95, p. 114.)

Finally, Juvenile Court determined that appellants had violated the Order of July 14, 1995, which required that they correct the adoption/foster care application and adoption petition to reflect Mrs. Derzack's previous psychiatric history and provide proof of annual income for the previous five years. The court based this determination on the following facts:

> Both the foster care application and the adoption application specially requested psychological and financial information. This information gives important insight into the prospective foster care and adoptive parents' emotional and financial ability to maintain the child being entrusted to their care and must be answered truthfully, if the best interest of the child is to be served. In response to these two specific questions on the adoption application filed by the Derzacks in August 1994, Karen Derzack responded "no" to the question addressing prior mental health treatment when, in fact, she had suffered from depression and a mental disorder which required professional treatment. Additionally, Michael Derzack listed their annual income as $168,000.00 when, in fact, his income tax statements reflected an income of $102,736.41 for a three year period extending from 1990-1993.

(Slip Op. At 25.)

As to their failures to comply with the Order of July 15, 1995, appellants present several characteristic

arguments. Initially, they claim the Order "simply does not say what the Court claims in attempting to justify its removal Order." (Appellants' brief at 32.) Appellants also claim "[t]he order does not indicate who it is directed to and it neither mentions the adoption papers nor the Derzacks' income." ***Id.*** The Order of July 14, 1995 provides in relevant part:

> Attempt correction by amended petition through me after correspondence between parties.

Order, 7/14/95, R. 372(b). Appellants are correct that this Order does not expressly mention them by name. However, since it was appellants who filed the original petition for adoption, we wonder who they believed the court was directing to file an amended petition. Further, since Mrs. Derzack's mental health history was the subject of the hearing which immediately preceded the Order, appellants' plea of ignorance as to the information to be "amended" is characteristically disingenuous. Once again, rather than seeking to clarify their alleged confusion before the court, appellants blatantly violated a valid court

Order and now seek to avoid the consequences of that violation by pleading ignorance. We will not countenance such evasion.

Appellants also seek to excuse their admitted misrepresentation as to Mrs. Derzack's mental health history by arguing that she had disclosed this history in a hearing prior to the placement of the children in their home. Thus, according to appellants, "the lower court and CYS were well aware of the discrepancy between the adoption application and Ms. Derzack's actual medical history[.]" (Appellants' brief at 31.) Appellants' argument fails. Merely because the court ultimately was informed of appellants' misrepresentation, it does not follow that appellants are somehow excused from the consequences of that misrepresentation. Similarly, the fact that Mrs. Derzack misrepresented her medical history on only one of the two occasions it was addressed does not nullify the misrepresentation. At any rate, appellants were not held in contempt for making the misrepresentation. Rather, they were held in contempt for disobeying a court Order to

correct the misrepresentation. Therefore, the question at issue is whether appellants complied with the mandate of the July 15, 1995 Order that they correct their adoption petition, and the record clearly indicates that they did not. In fact, at no point have appellants claimed otherwise.

As to their failure to correct the income reported on the application form, appellants attack Juvenile Court's reliance on their federal income tax returns, because "it is just as likely, from the evidence of record, that the Derzacks told the truth on the adoption papers and engaged in loose accounting methods for tax purposes." (Appellants' brief at 32.) Thus, according to appellants, Juvenile Court erred in finding appellants in contempt of the July 15, 1995 Order because it was unable to tell on which sworn document appellants lied. Initially, we reiterate that the overriding concern of Juvenile Court, in considering the best interests of dependent children, is the fitness of adoptive parents. Of course, untruthfulness in any form must be considered by the court, and it is irrelevant which of the two documents at issue manifests a

lie by appellants. Moreover, when presented with an opportunity to clarify his misstated income, Mr. Derzack testified as follows:

Q. [COUNSEL FOR CYS]: With regard to the information about the yearly income, now, you filled this [adoption] application out in August of 1994; is that correct?

A. Yes.

Q. Those are your signatures; is that correct [indicating]?

A. Yes.

Q. When you indicate yearly income of $168,000.00, that's for the year 1994?

A. On the advice of counsel, I'm going to refuse to answer that.

(N.T. at 128-129.) Mr. Derzack was then properly informed by the court that, in a civil proceeding, a negative inference may be drawn when a witness invokes the Fifth Amendment privilege against self-incrimination (N.T. at 129). *See* ***Baxter v. Palmigiano,*** 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) ("our conclusion is consistent with the prevailing rule that the Fifth Amendment does not

forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment 'does not preclude the inference where the privilege is claimed by a party to a civil cause.' 8. J. Wigmore, Evidence 439 (McNaughton rev 1961)".). Despite the court's warning, Mr. Derzack again invoked the privilege.

> Q. Isn't it true, Mr. Derzack, that with regard to this yearly income figure, whether it be—assuming it's 1994 or whatever year—that you gave the Internal Revenue Service different figures for your same income?
>
> A. Once again, on the advice of counsel, I'm going to refuse to answer that and invoke my Fifth Amendment privilege.

(N.T. at 129-130.) Thereafter, Juvenile Court, whose role it was to determine the credibility of witnesses, found that appellants had misstated their income on the adoption application. Appellants do not contest that they never corrected the improper income figure, as mandated by court Order. On this basis, we find no abuse of discretion in the court's conclusion that appellants violated the Order of July 14, 1995.

As this review indicates, it is appellants, rather than Juvenile Court, who seek to distort the record presented below. Viewed accurately, the record clearly reveals that appellants have cavalierly violated each and every Order cited by Juvenile Court, and the contempt citations therefore were proper. However, it does not necessarily follow that even repeated and blatant violations of numerous court Orders should result in removal of the children from appellants' care. As Judge Baer stated at the conclusion of the January 17, 1996 hearing, "We need to have a thick skin here. We're not going to use these children to punish these adults." (N.T. at 152.) Thus, consistent with our primary concern, the best interests of Byron and Byrae Griffin, we must consider whether removal was warranted under the facts of this case. We find that it was.

Our conclusion turns on the nature of the contempts committed by appellants. Had appellants' conduct, no matter how defiant, been directed solely at the court, with no resulting impact on the children, we would

be loathe to sanction removal. Simply put, removal is not an appropriate contempt sanction. A fine or even incarceration might well be more appropriate, so long as the children's best interests were thereby served. However appellants' conduct in the instant case has repeatedly and adversely affected the overall welfare of he children. Accordingly, we find that removal served the best interests of the children, and was not ordered as a contempt sanction.

Initially, appellants' decisions to take the children out of Allegheny County without notifying CYS and the court, and to unilaterally cancel visitation by CYS caseworker Jashinski, potentially placed the children at risk. At the contempt hearing of December 13, 1995, Mr. Jashinski testified in detail as to the importance of knowing the children's location at all times:

Q. [COUNSEL FOR CYS]: And one thing about leaving the jurisdiction, Mr. Jashinski. Can you tell us why it's important for foster parents or potential adoptive parents to notify CYS or the Court about leaving the jurisdiction?

A. Well, in case of an emergency, we need to know where to get in touch with the people. In case something happens to the kids why they are out of the country, we need to know that, in fact, they were there so that they can get appropriate help.

Q. Is CYS also responsible for making any medical decisions for these children?

A. Yes. Yes, they do.

Q. As a dependent child?

A. As a dependent child, yes.

Q. So it's fair to say that if something happened to Byron and Byrae out in California, you would need to know that so that you could, in fact—so CYS could, in fact determine medical treatment and what would be appropriate; isn't that correct?

A. Right. We would have to consent to any treatment that would be given to them.

Q. And if you don't know where they are, you can't consent, can you?

A. No.

Q. And also with regard to leaving the jurisdiction when you talk about emergencies, would you want to know where Byron and Byrae are at all times with regard to their natural family in any emergencies there and with regard to their siblings or their aunts or uncles or natural mother?

A. Well, yes. It would be important to know where to contact the family to pass on that information.

(N.T. at 50-52.) Further Juvenile Court explained:

> CYS, as agent for the court, placed Byron and Byrae into the care and custody of the Derzacks. Legal custody of the children, however, remained with CYS and the court and, as such, CYS as, at all times, ultimately responsible for the welfare of Byron and Byrae. This responsibility included a duty to monitor the Derzacks' treatment of the children and the children's adjustment to the Derzacks and their home environment. Monitoring was absolutely necessary in order for CYS to assure the Court that Byron and Byrae were (1) safe, (2) provided for and (3) free of issues that needed to be addressed.

(Slip Op. at 20.)

By removing the children from Allegheny County without consent and by refusing to allow visitation with Mr. Jashinski, appellants effectively precluded supervision by CYS and the court, the authorities ultimately charged with ensuring the welfare of Byron and Byrae. Clearly, by preventing such supervision, appellants placed the children at risk and thus adversely affected their best interests.

Similarly, appellants' refusal to allow family and sibling visitation was not in the best interests of the children. As Juvenile Court explained:

> The Court Orders [requiring visitation] were based upon Byron and Byrae's psychological bond with these relatives and the harm that would occur, if the children were separated from them.
>
> . . .
>
> The Court believed regular, private, visits with family members to be so important to the heathy development of Byron and Byrae that it also ordered the rescheduling of any visit which had not occurred on the regularly scheduled date.

(Slip Op. at 21.) Appellants' refusal to allow visits by the children's mother, siblings, paternal grandmother and maternal great aunt operated to deprive the children of any contact with their biological family. No expert testimony is necessary to establish that such a deprivation can be harmful. Nonetheless, the court had before it the testimony of Dr. Patricia A. Piercy, Ph.D., a child psychologist, who stated:

> [I]f the Court decides that the Derzacks should have the children, then I would strongly recommend that there are some resources available for Mrs. Ellis and her family. It would put a tremendous stress on them and on the children in that family. . .I think consideration should also be given to the sibling contact which had been the sibling relationship, the relationship between all five siblings, and that contact [should] be preserved in some way.

(N.T., 10/5/94, p. 25.) Accordingly, appellants' termination of family visitation did not serve the best interests of the children.

Likewise, as to appellants' repeated exposure of the children to intense publicity, Juvenile Court had before it extensive testimony from several witnesses that such exposure was harmful. For instance, Mr. Jashinski testified:

Q. [COUNSEL FOR CYS]: Mr. Jashinski, do you have concerns about Byron and Byrae being exposed to the public?

A. Yes. It's always certainly a concern to have children exposed to any type of unwarranted publicity. I mean, the damages that can be done are extremely exorbitant.

(N.T., 10/5/94, p. 173.) Moreover, testimony is not required to establish the likelihood that the public dissemination of the children's difficult background, as well as the drug use of their parents, is extremely harmful. There can be no question that appellants' repeated exposure of every aspect of this case to any media outlet available was not in the best interests of the children.

As noted *supra*, the decision of the Derzacks which possibly caused the greatest harm to the children was the termination of court-ordered counseling and therapy. As the court found:

> The record of the trauma imposed upon Byron and Byrae from birth indicated that therapy and counseling were necessary to maximize the children's chances for growing up to be normal functioning adults, free of trauma and mental disease. So critical was the need for the children to receive therapy, that the Court entered two Orders mandating therapy with Dr. Debra Klosterman for Byron and Byrae, with the expense of the therapy being paid by the Commonwealth.

(Slip Op. at 22.) Additionally, as noted, both appellants were aware that Byrae had been sexually abused. Nonetheless, they unilaterally decided to terminate court-ordered counseling thereby placing their distrust of CYS over the needs of Byron and Byrae. Once again, it is clear tha appellants' conduct in preventing desperately-needed professional care impacted negatively the best interests of the children.

Finally, as to appellants' failure to correct false information on the adoption application, the court found:

> The information contained in the Derzacks' application for consideration as a foster care family was one of the important factors used in selecting them as foster care parents for Byron.
>
> . . .
>
> This information gives important insight into the prospective foster care and adoptive parents' emotional and financial ability to maintain the child being entrusted to their care and must be answered truthfully, if the best interest of the child is to be served.

(Slip Op. at 28.) By misrepresenting mental health history and income, appellants placed the children at risk by failing to disclose factors which might notify CYS or the court that appellants were unable to provide sufficient emotional or financial support for the children. We reiterate that the court and CYS are ultimately responsible for the welfare of dependent children, and by lying to those authorities appellants acted contrary to the best interests of Byron and Byrae. As the court found, "providing false information relates directly, not only to the Derzacks' credibility, but also their fitness to serve as adoptive parents [and therefore] the Derzacks do not meet the standard of fitness with regard to honesty and integrity

required . . .to qualify them as adoptive parents." (Slip Op. at 28.)

Since the conduct underlying the contempt citations adversely affected the best interests of the children, we agree with Juvenile Court that removal was warranted. Other factors also indicate that the best interests of the children are served by the removal Order. For instance, testimony of two police officers presented at the January 17, 1996 hearing revealed that Karen Derzack requested police assistance to locate her husband on two occasions. On both occasions Mrs. Derzack expressed her concern that Mr. Derzack, who left his residence in a vehicle, was intoxicated and suffering from stress. (N.T., 1/17/96, pp. 32, 40). On the former occasion, Mr. Derzack did not return for more than two days (N.T. at 33). Further, the record reveals that on December 12, 1995, one day before the instant contempt proceeding, the Derzacks filed for personal bankruptcy claiming debts in excess of $540,000. This information, although not conclusive, provides additional support for

Juvenile Court's finding that appellants are unable, either emotionally or financially, to adequately care for the children. Hence, we find no abuse of discretion in the January 17, 1996 Order of Juvenile Court removing the children from the custody of appellants.

In closing, we note the following testimony of Mr. Derzack:

Q. [COUNSEL FOR THE CHILDREN]: In fact, you made some statements that when you believe that it was necessary or appropriate to disobey the Court order, you would do so; is that accurate?

A. Within the best interest of the children, yes.

(N.T., 10/5/94, p. 171.) For reasons that remain a mystery, this willingness to challenge not only the propriety of numerous court Orders, but also the authority of Juvenile Court to enter those Orders, became the mantra of appellants' strategy throughout the latter states of this case. Having voluntarily initiated the adoption process, appellants thereafter defiantly and repeatedly refused to abide by the rules of that process. Unfortunately, in waging their battle against CYS and

Juvenile Court, appellants lost sight of the needs of the children. On the record before us, we are unwilling to risk the possibility that appellants would do so again. The stakes are simply too high.

Based on all of the foregoing, we find that Juvenile Court had no choice but to order removal and alternative placement in an environment that will, at long last, serve the best interests of Byron and Byrae Griffin.[15]

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[15]We note that policy issues regarding interracial adoption and the concept of permanency planning are interlaced throughout the management of this case by CYS and Juvenile Court. However, these issues have not been considered herein since they are irrelevant to the resolution of this case.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION - JUVENILE SECTION

HISTORY NO. 34333 A-E
DOCKET NOS. 1608-92
2622-25-91

IN RE:
BYRON TODD GRIFFIN a/k/a
BYRON TODD JEFFREY and
BYRAE LAFAY GRIFFIN a/k/a
BYRAE LAFAY JEFFREY,

Minors

OPINION

CRAIG, C.

This matter is before the Court on a Petition for Contempt, as amended, filed by Children and Youth Services Agency of Allegheny County (hereinafter, "CYS") against Karen Derzack and Michael Derzack (hereinafter, "the Derzacks"), the proposed adoptive parents of Byron Todd Griffin a/k/a Byron Todd Jeffrey (hereinafter, "Byron") and his sister, Byrae Lafay Griffin (hereinafter, "Byrae").

On December 13, 1995 and January 17, 1996, this Court held en banc hearings to determine whether or not

the Derzacks had violated any or all of eight Orders, entered by the Court from October 5, 1994 to October 13, 1995, which gave specific directives concerning the care and protection of Byron and Byrae. Transcript citations refer to the transcribed notes of the December 13, 1995 hearing.

Byron and Byrae were born into an untenable environment, controlled by drugs and neglect. This environment threatened their survival. When this Court found that Mother could not protect her children because she could not or would not correct the problems creating their life-threatening environment, the children were adjudicated dependent and Mother's parental rights were terminated. Byrae was temporarily placed with her paternal grandmother at four months of age. Byron, born seven months after Byrae's placement with their paternal grandmother, was temporarily placed with the Derzacks at six days of age. After three placements each, Byron and Byrae were placed together with the Derzacks for the purpose of adoption. Over a period of one year, extending

from the date of final placement of the children with the Derzacks for the purpose of adoption and the date of filing of CYS' petition for Contempt naming the Derzacks as defendants, this Court entered eight Orders that related directly to the protection, care, welfare or best interest of Byron and Byrae. This Court found the Derzacks in contempt of Court, having failed or refused to comply with all eight Orders. The Derzacks' application for adoption was denied and Byron and Byrae were placed with another family for the purpose of adoption. The relevant facts are as follows:

FACTS

Byrae was born drug addicted, on July 30, 1991, to LaShawn Jeffrey (hereinafter "Mother") and Todd Griffin. Approximately one year later, on November 30, 1992, four months after Byron's birth, Todd Griffin died in an automobile accident. Byron and Byrae have three older siblings (brothers) who are the natural children of Mother, but have different fathers. Byron is the youngest of Mother's five children.

Byrae first came to the attention of this Court in November 1991. Byrae, then three months of age, drug addicted and weighing only seven pounds, six ounces, was removed from Mother's care and taken by paramedics to Children's Hospital where she was diagnosed as suffering from severe malnutrition, dehydration and a severe skin infection. Children's Hospital reported Byrae to be "near death" when admitted.

Following a hospitalization of one week, the matter of Byrae and her three older siblings was brought before this Court pursuant to a Petition for Dependency filed by CYS. On November 21, 1991, Byrae and her three older brothers were adjudicated dependent. Byrae remained hospitalized unable to be brought to Court on the day of adjudication. Her older siblings were present in Court and were removed that day by CYS from Mother's custody with Mother's consent, pursuant to Mother's acknowledgment that she was unable to care for her children because of a chronic drug dependency. Upon her discharge from Children's Hospital, Byrae was placed by

CYS into the care and custody of her paternal grandmother, Flora Griffin Shapiro. Byrae remained in the home of Flora Griffin Sharpiro for the next eighteen months.

Between the period of November 1991 to July 15, 1992, this Court held several hearings regarding the welfare of Mother's children wherein evidence of the severe nature and extent of the neglect suffered by Byrae and her older siblings was placed on the record. Based upon the serious nature of the information contained in the record, Byron's special health needs at birth as a result of his drug-addiction and Mother's abandonment of Byron when she failed to return to the hospital to take him home following his birth, CYS immediately filed a Petition for Dependency, with respect to Byron, within days of his birth. This Court entered an Order on July 27, 1992 adjudicating Byron a dependent child. For purposes of placement, Byron was designated a "child in need of special care".

Initially, CYS sought placement of Byron with relatives. When efforts to place him with relatives failed, CYS selected and approved the Derzacks, a foster care family with Family Services of Western Pennsylvania (hereafter, "Family Services"), as a *special needs care family,* for the singular purpose of accepting placement of Byron for a temporary period of time after his discharge from the hospital. The original understanding between CYS and the Derzacks was that Byron was being placed with the Derzacks for a few days, pending the outcome of the CYS' petition for Dependency which had been filed on Byron's behalf. Byron was placed with the Derzacks on July 21, 1992. On the date of his first placement, Byron was six days old.

Following the dependency adjudication, CYS returned Byron to the Derzacks' home while an adoption plan was being developed. Byron's original adoption plan was being developed under a new CYS policy which had been adopted on May 15, 1992 by CYS and captioned, "Children and Youth Services Transracial Placement

Policy" (hereafter "transracial placement policy"). The transracial placement policy was an internal policy which grew out of a national concern for African-American children being displaced in white homes and the impact of such placements on their lives. This policy was drafted by a CYS committee chaired by Mary C. Young, then the Recruitment and Placement Resources Manager for Children and Youth Services. As a matter of routine, draft copies of the transracial placement policy were circulated within the agency and the Court for review. On or about February 14, 1991, the Honorable Cheryl Allen Craig, a young, newly-appointed judge in the throes of her first election, received a courtesy copy of CYS' transracial placement policy to review. In the cover letter accompanying the draft of CYS' transracial placement policy, Ms. Young requested feedback from Judge Craig regarding CYS': (1) rationale for the policy, (2) limitations placed on how long a child could wait to be placed in an adoptive home of the same ethnic background, (3) position regarding children of mixed parentage and (4)

position regarding permanency. The last paragraph of Ms. Young's letter of February 13, 1991 read: "We would greatly appreciate your responses on this matter, if it will be of no conflict of interest in your present capacity. Please call me if you have any questions and/or advice on this subject." Ms. Young was deposed by counsel for the Derzacks on March 2, 1995. When asked, "Do you know if Judge Craig responded to this letter?", Ms. Young Testified, "She did not". Although Byron and the Derzacks' case fell under CYS' transracial adoption policy, Byron's status in the Derzacks' home remained uninterrupted for five months while CYS completed his adoption plan and identified an African-American pre-adoptive home.

By letter dated December 15, 1992, CYS advised the Derzacks that a pre-adoptive home had been found for Byron and that a representative of CYS would arrive at the Derzacks' home on December 16, 1992 to take him away. The Derzacks responded to the CYS letter by notifying the news media to come to their home to film their planned

confrontation with CYS. To avoid a confrontation with the Derzacks and trauma to Byron, CYS left Byron in the Derzacks' home and petitioned the Court that day for an immediate hearing to resolve the impasse. A hearing on CYS' petition was held before this Court on the following day, December 17, 1992.

At the hearing held December 17, 1992, this Court specifically addressed CYS' internal transracial placement policy and determined that CYS' selection of an African-American pre-adoptive home for Byron, solely on the basis of color was not in the best interest of the child. Consequently, this Court overruled CYS' internal transracial placement policy and entered an Order continuing Byron's placement with the Derzacks. This Court further ordered CYS to assist the Derzacks in adopting Byron, thus rendering moot, the issue of transracial adoption with respect to the Derzacks, this Court having found in favor of the Derzacks when Byron was returned to them, for the purpose of adoption, in December 1992.

With the exception of giving birth to Byron on July 15, 1992, Mother remained absent from and uninvolved in the rearing of Byron and Byrae from November 1991 until January 1993. On or about January 1993, Mother visited with Byrae, who was then living with her paternal grandmother, and attempted to reestablish a mother-child relationship with Byrae, for the first time since the child's dependency adjudication in November 1991. No attempt was made by Mother to visit with Byron, at this time. The Court, therefore, returned Byron to the Derzacks, following a review hearing held on March 12, 1993. Dr. Patricia Piercy was appointed to conduct psychological evaluations of Byron and to monitor and evaluate his adjustment to living with the Derzack family.

In late March 1993, Mother contacted CYS and, for the first time since his birth, requested to visit with Byron. Although still drug dependent, Mother advised CYS the she had completed a twenty-eight day program in Meadeville, Pennsylvania and desired to find placement in a longer term drug rehabilitation program with the hope

that she could eventually regain custody of her children. Subsequently, Mother was accepted into an inpatient drug rehabilitation program at the Sojourner House in Pittsburgh, Pennsylvania. Her official entry date into the program was April 6, 1993.

Based upon Mother's success at Sojourner House, this Court entered an Order on June 25, 1993 reuniting Mother and Byrae. Byrae was removed from the home of her paternal grandmother and sent to live with Mother and Byrae at Sojourner House. On December 20, 1993, based upon progress shown in Mother's treatment in her drug rehabilitation program and her desire to be reunited with her youngest child, this Court ordered that Byron be sent to live with Mother and Byrae at Sojourner House. The Order included a stipulation that in the event that Byron needed "respite, shelter or temporary care", the Derzacks should provide it.

On December 21, 1993, the Derzacks issued a news release criticizing Mother. After the news release, the Derzacks contacted the news media and invited them

to be in attendance at their home to film and report Byron's removal. Even though CYS attempted to avoid additional media exposure to Byron by changing the removal date from December 28th to December 27th, the Derzacks were successful in creating another media spectacle of the event. In spite of the media spectacle, Byron was removed from the Derzacks' home on December 27, 1993, pursuant to this Court's Order of December 20, 1993.

On **January 24, 1994**, this Court issued an Order prohibiting the discussion of Byron in public by anyone involved in any capacity with Byron's care and granted the Derzacks permission to visit with Byron four hours a month. This Court was advised on or about February 1994 that the Derzacks had ignored the January 24, 1994 court Order and had hired a writer with whom they intended to co-write a book about Byron entitled, "Bird Without Feathers". "Bird Without Feathers" was subsequently written and published.

Mother, Byrae and Byron lived together at Sojourner House until April 1994. In April 1994, Mother was released from Sojourner House and entered a relapse prevention program known as the Penn Free Program with Byron and Byrae. The Penn Free Program is designed to assist chemically dependent individuals in making the transition from a structured rehabilitation program to independent living in the community. On April 20, 1994, the Derzacks' visitation privileges, as to Byron, were terminated when Michael Derzack spoke to the media in violation of this Court's January 1994 Order prohibiting the discussion of Byron in public. In spite of the Court's termination of their visitation privileges, the Derzacks continued to place Byron's case before the public, in complete disregard for the Order of Court prohibiting such behavior.

In spite of the intensive assistance provided by the Penn Free Program and the Right Start Program, an in-home parenting service provided to Mother four days a

week by CYS, mother renewed her drug use in June 1994.

On June 28, 1994, Byron and Byrae were removed from the custody and care of Mother when the Court received evidence that Mother was again using crack cocaine. By Order of Court, as a temporary measure until further order of court, Byron and Byrae were placed with their older siblings in the home of their maternal great aunt, Marion Ellis. This was the third placement family for both Byron and Byrae.

On July 5, 1994, this Court reviewed Byron's and Byrae's temporary placement with Marion Ellis. At this hearing, the Court ordered the continued temporary placement of Byron and Byrae with Marion Ellis and interactional and developmental evaluations of Mother and all of her five children. Mother was also granted unlimited supervised visits with Byron and Byrae based upon her renewed active participation in the Penn Free Program. In spite of the efforts of the Court and CYS to assist Mother in every way possible to maintain a relationship with Byron

and Byrae, Mother resumed her drug use within two weeks of issuance of the July 5, 1994 Order of Court. Consequently, this Court granted a Petition to intervene filed by the Derzacks and directed CYS to file a petition to terminate Mother's parental rights as to Byron and Byrae within ninety days. Interactional and developmental evaluations of Marion Ellis, the Derzacks, Byron and Byrae were ordered by the Court.

Byron and Byrae remained in the care and custody of Marion Ellis until October 6, 1994. During the time that Byron lived with Marion Ellis, he continued to visit with the Derzacks. Based upon the recommendations set forth in the interactional and developmental evaluations and upon Marion Ellis' health and surrogate responsibilities with regard to Mother's three older children, this Court determined that it was in the best interest of Byron and Byrae to be placed with the Derzacks for the purpose of adoption.

In preparation for what was hoped to be Byron and Byrae's last placement into the care and custody of the

Derzacks to await completion of the Derzacks' adoption plan, this Court entered an Order on **October 5, 1994** which incorporated dependency restrictions and foster care regulations. The dependency restrictions and foster care regulations clearly stated that written consent from CYS or an Order of Court was needed for the Derzacks to travel outside of Allegheny County with Byron and Byrae. This Order was later ignored by the Derzacks when they travelled with Byron and Byrae to California and New York to tape several nationally televised talk shows discussing the children without written consent from CYS or this Court.

On **October 6, 1994**, this Court ordered that both Byron and Byrae be immediately placed with the Derzacks as an adoptive foster care placement and, inter alia, that supervised visitation privileges be granted to Byron and Byrae's Mother, paternal grandmother and three older siblings. Two weeks later, on October 20, 1994, the Derzacks appeared in The Maury Povich Show, a nationally televised talk show, discussing Byron and his

case, in violation of this Court's Order of January 24, 1994. In response, the child advocate representing the interests of Byron and Byrae petitioned this Court to find the Derzacks in contempt of court for violation of its Order of January 24, 1994. On **November 14, 1994,** this Court entered a second Order prohibiting all parties from exposing Byron and Byrae to the public vis-a-vis discussions or references.

On **April 12, 1995**, this Court heard CYS' petition to involuntarily terminate Mother's parental rights and entered supplemental orders which modified this Court's October 6, 1994 Order by (1) granting visitation rights to additional relatives of Byron and Byrae, (2) providing a time certain for Byron and Byrae's great aunt, paternal grandmother and siblings to visit with the children and (3) reaffirming its November 14, 1994 Order that all parties refrain from public discussion or reference to the children.

At the Derzacks' contempt hearing held December 13, 1995 before the court en banc, Timothy Jashinski, an adoption caseworker for CYS, testified that the Derzacks

initially permitted Byron's and Byrae's great aunt, paternal grandmother and siblings to visit the children upon request for several months, in compliance with this Court's Orders. Then, shortly after learning of CYS' petition for termination of the parental rights of Mother, the Derzacks began to refuse to allow Byron and Byrae to visits with their relatives and siblings unless they (the Derzacks) were permitted to be a part of the visits. (Tr.30, 103). Timothy Jashinski testified that the Derzacks unilaterally terminated Byron and Byrae's visits with their relatives and siblings, in August 1995, stating to CYS that their attorney had told them that they had been "granted" or "appointed" *in loco parentis,* they repeatedly used the term to justify their refusal to obey any and all Court Orders issued after April 1995.

On **May 9, 1995,** this Court entered an Order directing CYS to comply with this Court's Order of October 6, 1994, with respect to family member visitations with the children. The Order of May 9, 1995 further directed CYS to arrange for professional therapeutic intervention,

consultations and evaluation of Byron and Byrae. Additionally, the CYS caseworker was ordered to make announced and unannounced visits at the home of the Derzacks. In May 1995, Dr. Debra Klosterman, was under contract with CYS to observe Byron and Byrae's interactions with the Derzacks and with their relatives and siblings during scheduled visits. (T. 105). The Derzacks, however, failed or refused to schedule visits with Dr. Klosterman and Byron and Byrae until after the Contempt hearing held on December 13, 1995.

On **August 14, 1995,** this Court found that it was in the best interest of Byron and Byrae to visit with their siblings and their paternal grandmother and ordered that the siblings and paternal grandmother visit with Byron and Byrae every week, free of observation, attendance or participation of the Derzacks until further Order of Court. The Order of November 14, 1994, prohibiting all parties from exposing Byron and Byrae to the public vis-a-vis discussions or references, was to remain in full force and effect.

In spite of the Orders of October 5, 1994, prohibiting travel outside of Allegheny County without the consent of CYS or the Court, the Derzacks travelled to New York with Byron and Byrae to appear on the Montel Williams talk show on October 16, 1995 and, as part of their interview, mentioned over national television the children's names and discussed the circumstances surrounding the children being in their care. Since October 16, 1995, the Derzacks have appeared on the following nationally televised talk shows discussing Byron, Byrae and/or their legal and personal efforts to gain custody of the children: Sally Jesse Raphael Show, the Leeza Gibbons Show and the Rikki Lake Show. This Court takes judicial notice of Byron and Byrae's appearance "on camera" on at least three of the televised talk shows and of the appearance of their names and photographs in numerous newspaper articles. The unauthorized travel to appear on talk shows and the intentional exposure of Byron and Byrae to the media, for the purpose of discussion of this case, was in violation of

this Court's Orders of October 6, 1994, November 14, 1994, April 12, 1995 and August 14, 1995.

On October 27, 1995 Timothy Jashinski made an announced, prescheduled visit to the home of the Derzacks and was prevented by Karen Derzack from speaking privately with Byron and Byrae and observing their physical condition up close. According to Timothy Jaskinski's testimony, Karen Derzack placed Byron and Byrae at the top of the stairs while he remained at the bottom of the stairs, believing that he was not permitted to go up the stairs. (Tr. 103). After asking Byron and Byrae two or three general questions, Karen Derzack abruptly terminated Timothy Jashinski's visit with the children by telling him that "the questions will stop". (Tr. 88).

In November 1995, this Court was advised by the child advocate representing Byron and Byrae, that based upon information contained in a federal lawsuit for workers compensation filed by Karen Derzack in August 1994, Karen Derzack had failed to properly answer a question on the Derzacks' foster care application which concerned

past treatment for a mental illness. This same question was also improperly answered on the Derzacks' application for adoption. The Court was further advised that the Derzacks had falsely represented their income on either their IRS tax returns or their adoption application or both, as these two documents reflected a significant discrepancy of tens of thousand of dollars per year in the Derzacks' reported annual income from 1990 to 1993.

On December 1, 1995, one day before the instant Contempt hearing, the Derzacks filed for personal bankruptcy claiming debts in excess of $540,000.00. The Derzacks stated that their legal expenses had forced them into bankruptcy.

On December 13, 1995, the hearing on CYS' Petition for Contempt, as amended, was held before this Court. In spite of the undisputable evidence presented at the hearing to the contrary, Mrs. Derzack denied that, (1) she had refused to allow Timothy Jashinski access to Byron and Byrae, (2) she had ordered Timothy Jashinski from her home on October 27, 1995, (3) she was in

violation of this Court's "gag Order" when she appeared on talk shows hosted by Sally Jesse Raphael, Rikki Lake, Montel Williams and Leeza Gibbons, (4) she had failed to request permission of CYS or this Court to travel to California to tape the Leeza Gibbons show, (5) she had unilaterally terminated Byron and Byrae's therapy with Dr. Klosterman and (6) she had misrepresented the truth when she failed to acknowledge on her adoption application that she had received psychological/psychiatric care and therapy in the past. (Tr.111-115). Further, despite the undisputed evidence to the contrary, Mrs. Derzack could not remember or did not know/belieeve that (1) the Derzacks were a court ordered foster placement home, (2) Byron and Byrae had only one visit with Dr. Klosterman from July 1994 through December 13, 1995, (3) Judge Jaffe had the right to Order the Derzacks to do anything in this case that he believed was in the best interest of Byron and Byrae, and (4) she had problems remembering dates, events, conversations or the like, (Tr.111-125). At this same hearing, when asked about his

1994 yearly income of $168,000 on the Derzacks' adoption application, Michael Derzack invoked his Fifth Amendment privilege against self-incrimination.

On January 17, 1996, the court en banc reconvened to hear evidence discovered by CYS after the December 13, 1995 hearing. At this hearing the Derzacks presented, "inter alia," a Motion to Recuse the Honorable Cheryl Allen Craig, an African-American, who, as a Judge in the Juvenile Section of the Family Division of the Court of Common Pleas of Allegheny County was invited to sit on the court en banc with the Honorable Joseph Jaffe, presiding Judge of all matters related to this case since 1991, and the Honorable Max Baer, Administrative Judge of the Family Division of the Court of Common Pleas of Allegheny County. At the conclusion of the reconvened hearing of January 17, 1996, this Court found the Derzacks in contempt of eight Orders of Court entered between October 5, 1994 and October 13, 1995 and directed CYS to immediately remove Byron and Byrae

from the custody of the Derzacks and place them with another pre-adoptive foster family.

The Derzacks filed an immediate appeal. Pursuant to this Court's Order, a Statement of Matters Complained of on Appeal was filed by the Derzacks asserting that:

1. The lower court erred in finding the Derzacks in contempt.

2. The lower court erred in removing the children from the Derzacks.

3. The lower court erred in failing to consider the best interest of the children.

4. The lower court lacked jurisdiction over the matter.

5. The Honorable Cheryl Allen Craig erred in failing to recuse herself.

DISCUSSION

Contempt of Court.

The evidence in support of CYS' Petition for Contempt, as amended, presented at hearings held before the Court en banc on December 13, 1995 and January 17, 1996 was overwhelming and more than sufficient to find that the Derzacks willfully disregarded this Court's lawful

Orders and failed to comply with an undertaking which the Court had specifically directed. Based upon the evidence presented at said hearings, this Court found that the Derzacks, by reason of conduct or nonfeasance which was calculated to embarrass, hinder or obstruct the administration of this Court, were in civil contempt of the following eight Order of Court entered by this Court between October 5, 1994 and October 13, 1995:

1. Court Order No. 1 - Entered October 5, 1994, ordering, inter alia, the Derzacks to receive written permission from the Court or CYS before travelling outside of this Court's jurisdiction with Byron and Byrae.

2. Court Order No. 2 - Entered October 6, 1994, ordering immediate placement of Byron and Byrae with the Derzacks, as adoptive foster parents; CYS supervised visitation privileges for Byron and Byrae's Mother, siblings, great aunt and paternal grandmother, and therapy sessions with a psychologist for Byron and Byrae.

3. Court Order No. 3 - Entered November 14, 1994, ordering that Byron and Byrae have no contact with the public vis a vis discussing or referring to the case in any public context or forum.

4. Court Order No. 4 - Two Orders entered April 12, 1995, modifying, inter alia, this Court's Order of October 6, 1994 to set a time certain for family visitations with Byron and Byrae.

5. Court Order No. 5 - Entered May 9, 1995, ordering CYS to comply with the Order of October 6, 1994 and arrange for therapy and counseling for Byron and Byrae, evaluate the effects of family visits on Byron and Byrae and make announced and unannounced visits to the Derzack home to monitor and evaluate the home situation.

6. Court Order No. 6 - Entered July 14, 1995, ordering the Derzacks to correct their adoption/foster care application and adoption petition to reflect Karen Derzack's previous psychiatric history and provide proof of the Derzacks' annual income for the previous five years.

7. Court Order No. 7 - Entered August 14, 1995, specifically ordering the Derzacks to cease from observing, attending or participating in any visits between Byron, Byrae and family members. The Derzacks were further ordered to reschedule any visits with the children and their relatives that were cancelled or did not take place.

8. Court Order No. 8 - Entered October 13, 1995, ordering the Derzacks to permit announced and unannounced home visits with Byron and Byrae by CYS caseworker.

In a civil contempt proceeding, the defendant may assert present inability to comply with an Order, but in raising this defense, the defendant has the burden of proof. U.S. v. Rylander, 460 U.S. 752, 103 S.Ct. 1548, 75 L.Ed 2d 521 (1983). In the instant case, the Derzacks

presented no defense for their contempt of this Court's Orders. Instead, both Karen Derzack and Michael Derzack further attempted to ridicule this Court by being coy and evasive when responding to questions asked during cross-examination. Neither Karen Derzack or Michael Derzack presented a defense or argument in support of a finding that there was any rational basis for their failure or refusal to comply with this Court's Orders. The Derzacks, therefore, failed to meet their burden of proof.

- The Derzacks' refusal to allow the CYS caseworker to visit with Byron and Byrae.

Violation of Court Orders Nos. 5 and 8.

With the termination of Mother's parental rights by decree entered April 1995, the behavior of the Derzacks seemed to change, or if not to change, to become more noticeably unpredictable and liable to judicial inquiry. The first indication that the Derzacks' behavior could lead to serious consequences occurred at approximately 9:45 a.m. on August 22, 1995 when Timothy Jashinski received

a telephone call from Michael Derzack advising CYS of the Derzacks' position regarding The Honorable Joseph Jaffe's Order of Court dated August 14, 1995. The Derzacks' position included, inter alia, that "There [would] be no further visitation, period." The Derzacks' position was considered to be a response to the directive in the August 14, 1995 Order which specifically ordered the Derzacks to allow Byron and Byrae to have private visitations with CYS and family members as follows:

> "Permitted at their [Byron and Byrae] visits in addition to supervising personnel are the five children and Maternal Great Aunt Marion Ellis, only. Specifically, Michael and Karen Derzack are not permitted to observe, attend or participate in these visits. Michael and Karen Derzack are permitted to wait in a room provided for them at the CYS Regional Office during said visits."

The Derzacks were sincere in their position that visitations would cease and immediately curtailed all visitations, including announced and unannounced visits by CYS which were ordered by this Court, pursuant to Judge Jaffe's Order of Court dated May 9, 1995. In a "Summary of Contact" report prepared by Timothy Jashinski and

copied to the adoption and law departments, Timothy Jashinski writes:

> "On [10]-27-95, I arrived at the Derzacks' home for my previously scheduled 3:00 p.m. visit. Upon arrival, Mrs. Derzack answered the door and I was permitted to enter their home. Mrs. Derzack appeared upset at my presence and asked me what this visit would entail. I explained to her that I would be greeting the children, finding out how they are doing, then ending my visit.
>
> At this time, Mr. Derzack came downstairs, greeted me and mentioned that the children were going to a Halloween party tonight. Mrs. Derzack called for the children who were upstairs. Byron was in the Derzacks' room watching a movie with the Derzacks' son, Chris. Chris brought Byron out and sat him at the top of the stairs. Mrs. Derzack retrieved Byrae from her room and sat her at the top of the stairs. Mrs. Derzack then instructed the children to say Hi to me. I asked how they were and they responded "fine". I next asked if they were ready for trick or treating and what they were going to be. Mrs. Derzack abruptly dismissed the children, physically putting them back in the rooms where they were. She said that I had completed what I informed her that this visit would entail and that the visit is over. She mentioned that the only reason that I was allowed to visit was because of the court Order. She also stated that the court Order was illegal and that she was tired of us messing with her family. Mrs. Derzack also mentioned several times that this was their home and that she would not tolerate our intrusion.
>
> Mrs. Derzack appeared to be very angry and upset at my presence. I cannot comment on how the

children are doing since this visit lasted approximately five minutes, the children were at the top of the staircase and the visit was terminated by Mrs. Derzack after two questions were asked."

At the hearing held on December 13, 1995, Timothy Jashinski testified as follows:

Q. And did you attempt to make announced and unannounced visits to the Derzack home?

A. Yes, I did.

Q. And can you tell us from the time of May of 1995 up until October of 1995, did you make unannounced and announced visits?

A. Yes, I did.

Q. And can you tell us how that proceeded? Did it go well?

Q. Most of the times it did go well, but there was like—when I would arrive, they would allow me in the home. I spoke with the children. I spoke with the Derzacks. And usually it wasn't a problem.

A. When did it start becoming a problem?

A. There were some—since there were so many Court hearings, contempts, motions, various hearing, the problems started, I believe, in August, It was the Derzacks understanding or what they stated to me was that they had been granted or been appointed "in loco parentis" and that my visitation was not permitted.

Q. Let me clear this up. The Derzacks were saying to you that they were in loco parentis?

A. That is what they told me.

Q. So that was back in August of 1995; is that correct?

A. Yes.

Q. Did you attempt to visit the Derzack residence after the issuance of the October 13, 1995 Order?

A. Yes, I did.

Q. Can you tell us what occurred?

A. I scheduled a visit for October 27th at 3:00 o'clock. I arrived. . . .

Q. Was Mrs. Derzack friendly to you when you came to the door?

A. I wouldn't say friendly, no.

Q. So she ushered you in, and then what happened?

A. Then she asked me why I was there, and I informed her that I was there to follow the Court Order and I was going to find out—you know, say hello to the kids; find out how they were, and then leave.

Q. And what happened?

A. She had—the kids were upstairs. She had them come out of their rooms. She put them at the top of the stairs.

Q. Where were you?

A. I was at the bottom in the entrance of the house. I said hello to the kids. The kids said hi to me. I asked them how they were doing. They said fine. Then I proceeded—Mr. Derzack had mentioned something about them going to a Halloween party, so I just asked them, you know, if they were ready for trick or treating or what they were going to be, and then Mrs. Derzack abruptly ended the visit.

Q. What happened? Paint a picture for us what occurred?

A. She mentioned the fact that I was interrogating the kids; that the Court Order wasn't valid because the judge had no jurisdiction over allowing people into their home, I believe. So, you know, I accomplished what I told her I set out to do, which was to find out how the kids were doing and to greet them. So the visit ended.

Q. Was she angry?

A. I would say so.

There was a rational basis for the Court's visitation Orders, as to CYS. CYS, as agent for the court, placed Byron and Byrae into the care and custody of the Derzacks. Legal custody of the children, however, remained with CYS and the court and, as such, CYS was, at all times, ultimately responsible for the welfare of Byron

and Byrae. This responsibility included a duty to monitor the Derzacks' treatment of the children and the children's adjustment to the Derzacks and their home environment. Monitoring was absolutely necessary in order for CYS to assure the Court that Byron and Byrae were (1) safe, (2) provided for and (3) free of issues that needed to be addressed. The Derzacks' refusal, whether overt or covert, to allow Timothy Jashinski to physically observe Byron and Byrae and speak with them privately, prevented CYS from monitoring the welfare of Byron and Byrae and did not serve the best interest of the children. We, therefore, find that the Derzacks' refusal to allow Timothy Jashinski to visit privately with Byron and Byrae was not only in violation of this court's Orders of May 9, 1995 and October 13, 1995 but also placed in jeopardy the safety and welfare of Byron and Byrae.

<u>The Derzacks' unilateral termination of Byron and Byrae's visitations with Mother, siblings, paternal grandmother and maternal great aunt</u>.

Violation of Orders Nos. 2, 4, and 7

The Derzacks' termination of CYS' visitation privileges included the termination of relative visitation privileges, in spite of the fact that this Court had entered two Orders specifically mandating the Derzacks to assist and cooperate with CYS in arranging and implementing regular visits with Byron and Byrae and their siblings, paternal grandmother and maternal great aunt. These visits were to be private, without the Derzacks in attendance. The Court Orders were based upon Byron and Byrae's psychological bond with these relatives and the harm that would occur, if the children were separated from them. Additionally, the Court was concerned that the children could not or would not speak openly and freely in the Derzacks' presence, if they had problems or concerns that involved the Derzacks. The Court believed regular, private, visits with family members to be so important to the healthy development of Byron and Byrae that it also ordered the rescheduling of any visit which had not occurred on the regularly scheduled date. No cancelled

family visits, however, were ever rescheduled by the Derzacks, nor did any family visits take place after August 1995, while the children were in the custody of the Derzacks.

Without warning or reason other than they believed themselves to be *in loco parentis* and without consideration for the potential long-term psychological harm to Byron and Byrae, the Derzacks unilaterally terminated visitation rights as to all relatives in August 1995 in contempt of this Court's Orders of April 12, 1995 and August 14, 1995.

<u>The Derzacks termination of therapy sessions for Byron and Byrae with Dr. Klosterman, a trained medical practitioner</u>

Violation of Court Orders Nos. 2 and 5.

After the Court's granting of CYS' selection of the Derzacks as the pre-adoptive parents in July 1995, the Derzacks' behavior towards the children and their environment become more and more isolationist. In contravention to this Court's Orders of October 6, 1994

and May 9, 1995, the Derzacks failed or refused to take the children to a mental health professional for therapy.

The record of the trauma imposed upon Byron and Byrae from birth indicated that therapy and counseling were necessary to maximize the children's chances for growing up to be normal functioning adults, free of trauma and mental disease. So critical was the need for the children to receive therapy, that the Court entered two Orders mandating therapy with Dr. Debra Klosterman for Byron and Byrae, with the expense of the therapy being paid by the Commonwealth. As with the visitation privileges, the Derzacks cancelled or failed to schedule appointments with Dr. Klosterman between July 1995 and October 12, 1995. The October 12, 1995 appointment with Dr. Klosterman was for Byron, only, and occurred one day before the hearing on a CYS Petition for Contempt. (Tr. 42)

<u>The Derzacks' travel with Byron and Byrae to California and New York to tape television programs without written</u>

permission from CYS or consent of Court to travel outside of Allegheny County

Violation of Court Orders Nos. 2 and 5.

In Allegheny County, foster parents, whether court ordered or approved by CYS or another provider, are not permitted to take their foster children out of the jurisdiction of Allegheny County, without either CYS or Court permission. (Tr.48). The Derzacks were not only aware of this requirement through conversations with CYS (Tr.50) and information contained in the foster care manual which is provided to all foster care parents, but they were also made aware of this travel requirement, having received a copy of this Court's Order of October 5, 1994 which clearly sets forth that authority for the Derzacks to travel out of the jurisdiction with Byron and Byrae rests with CYS and the Court. (Tr.105)

At the December 13, 1995 contempt hearing, Karen Derzack testified that she had appeared on the Rikki Lake, Montel Williams, Sally Jesse Raphael and Leeza nationally televised talk shows with Byron and

Byrae, but showed disdain for the Court when asked whether she had requested permission to travel with the children outside of Allegheny County to appear on these shows:

Q. With regard to the Gag Order, it's also my understanding that you have appeared on the Rikki Lake Show; is that correct?

A. Yes.

Q. And you've appeared on the Montel Williams Show, is that correct?

A. Yes.

Q. You admit you appeared on Sally Jesse Raphael, is that right?

A. Yes.

Q. And you also admit that you've appeared on the Leeza Show?

A. Yes.

. . .

Q. Do you admit that you violated this Court's Gag Order with regard to your appearances on Rikki Lake and Montel Williams and Leeza?

A. Do I admit I violated them?

Q. Yes.

A. No, I do not.

Q. You admit that you failed to request permission of CYS or this Court to go to California to tape the Leeza Show?

A. I do not admit that.

Q. Did you ask permission?

A. From?

Q. From CYS or this Court to go tape the Leeza show in California?

A. No, I do (sic) not.

Q. But yet you don't consider that a violation of Court Orders in this case?

A. I did not violate any Court Order.

The Derzacks' refusal to correct mental health and income information on adoption application filed with this Court.

Violation of Court Order No. 6

In 1992, CYS contracted with Family Services to temporarily place Byron with the Derzacks and approved the Derzacks as a special needs foster care home for the singular purpose of temporarily placing Byron into their home. The information contained in the Derzacks' application for consideration as a foster care family was

one of the important factors used in selecting them as foster care parents for Byron.

In October 1994, after removal from the Derzacks' home and several unsuccessful placements, Byron, now with his older sister, Byrae, were placed with the Derzacks, for the purpose of adoption. Both the foster care application and the adoption application specially requested psychological and financial information. This information gives important insight into the prospective foster care and adoptive parents' emotional and financial ability to maintain the child being entrusted to their care and must be answered truthfully, if the best interest of the child is to be served. In response to these two specific questions on the adoption application filed by the Derzacks in August 1994, Karen Derzack responded "no" to the question addressing prior mental health treatment when, in fact, she had suffered from depression and a mental disorder which required professional treatment. Additionally, Michael Derzack listed their annual income as $168,000.00 when, in fact, his income tax statements

reflected an income of $102,736.41 for a three year period extending from 1990-1993.

In November 1995, CYS learned that the information provided by the Derzacks on the dual purpose foster/adoption application concerning Karen Derzack's mental health history and Michael Derzack's annual income was false. At the December 13, 1995 hearing on CYS' Petition for Contempt, Karen Derzack was vague and unresponsive in answering questions concerning her failure to answer "yes" to the question on the adoption application which specifically asked whether she had ever received psychological care. Karen Derzack testified as follows:

Q. Mrs. Derzack, there's been some discussion that on your foster care application you stated that you never received psychological care and that that was untrue; is that correct?

A. Can you restate that, please.

Q. Is it correct that the statement you made on your foster care application that you've never been under psychological or psychiatric care was false?

A. Are you referencing this here (indicating)?

Q. The foster care application.

A. That's what it says.

Q. Untrue; is that right?

A. I'm not sure that's the way to put it.

Q. How would you put it?

A. I'd put it that the agencies and the doctors according to the Court Orders involved in the Court sessions all knew the history.

Q. How did they know the history?

A. Because I had told everybody right up front.

Q. So you told Children & Youth Services before you filled out that form that you had a psychiatric history, and so they were aware of it. That what you're saying?

A. Did I tell them personally, CYS?

Q. Uh-huh.

A. No

Q. How is it that you think they knew?

A. It's my understanding from the services I had told—Dr. Piercy I told by a Court-Ordered evaluation. I may have somewhere along the line have told CYS. I don't remember specifically. It was always indicated to me it was a non-issue. That's what Dr. Piercy had said to me, and if she felt it was an issue, it would be brought to the Court.

Q. If all of these people knew about it and you had told so many other people, why did you write no on the form?

A. Because it's not an issue.

Q. And it's not an issue because?

A. Because there is no problem.

Q. Who decided that there's no problem?

A. I know that there's no problem, and also the authorities involved knew and they did not see a problem; Dr. Piercy significantly.

Q. That's the same principle you used in filling out the rest of the application?

A. Excuse me?

Q. When you were filling out the rest of the application, besides that question, did you use the same principle to guide you; that if something was not a problem, you didn't mention it?

A. I don't know how to answer that.

Q. At any rate, at sometime in the past, you had an illness you sought psychological or psychiatric treatment; Is that right?

A. Yes. (Tr. 115-117)

At this same hearing, Michael Derzack repeatedly invoked his Fifth Amendment privilege as to all questions

asked concerning the truth or falsity of his 1993 annual income which was listed on the Derzacks' application for adoption as $168,000.00. The Derzacks' 1993 annual income came under scrutiny when Michael Derzack reported an income of $475,736.41 between 1990 and 1993 in a federal lawsuit filed by the Derzacks. The Derzacks, however, had reported a total three year income from 1990-1993 of $102,736.41 to the Internal Revenue Service. Michael Derzack was advised by the Court that, although he had every right to invoke his Fifth Amendment privilege because of possible litigation with the Internal Revenue Service (IRS) which could result in a criminal indictment, the hearing before this Court was a civil proceeding and a negative inference could be drawn from his failure to answer.

Although it is not the province of this Court to evaluate the mental health status of individuals or to determine the truth or falsity of the information submitted to the IRS, it is the province of this Court to determine the fitness of all adoptive parents. We find that the Derzacks

knowingly provided false information on their adoption application. Providing false information relates directly, not only to the Derzacks' credibility, but also to their fitness to serve as adoptive parents. Based upon the negative inferences drawn from cross examination of both Karen Derzack and Michael Derzack, this Court finds that the Derzacks do not meet the standard of fitness with regard to honesty and integrity required by this Court to qualify them as adoptive parents. Under these circumstances, we are compelled to order the immediate removal of Byron and Byrae from the care and custody of the Derzacks and their placement in another pre-adoptive home.

Based upon the above findings of fact, this Court has denied the Derzacks' application for adoption and has found that the Derzacks are guilty of civil contempt, having violated this Court's Orders of October 5, 1994, October 5, 1994, November 14, 1994, April 1, 1995, May 9, 1995, July 14, 1995, August 14, 1995, and October 13, 1995. Further this court finds that it is in the best interest of

Byron and Byrae to be removed immediately from the care and custody of the Derzacks and placed in a CYS approved adoptive foster care home.

A lower court has both legal and constitutional authority to use its remedial power of civil contempt to force compliance with its lawful conditional orders where its dominant purpose is to vindicate the dignity and authority of the court and to protect the interest of the general public.

Removal of the Children

Pre-adoptive parents are not entitled, at any time, to the protections afforded a natural parent and cannot acquire such protection prior to final adoption. Although this Court sympathizes with the shock and confusion that any parent would feel with the removal of one's children from one's home, CYS has the authority to remove a child from a pre-acoptive home at any time prior to final adoption, if CYS believes, as in this case, that the welfare of the child is in jeopardy.

On January 17, 1996, pursuant to a hearing on the contempt petition filed by CYS, recommendations of CYS and the child advocate and the overwhelming evidence placed on the record, the Court en banc found the Derzacks to be in contempt of eight Orders of Court and inter alia, denied the Derzacks' adoption petition. Concurrent with the finding of contempt was a finding of unfitness of the Derzacks to continue to serve as surrogate parents to Byron and Byrae. An appropriate Order was issued to immediately remove the children from the custody of the Derzacks at the conclusion of the hearing, as permitting the children to remain in the custody and care of the Derzacks after a finding of unfitness would not have been in the best interest of Byron and Byrae.

Removal of Byron and Byrae from the Derzacks' home was not a sanction imposed upon the Derzacks for their contempt of this Court's Orders. These children were removed because removal was in their best interest. In dealing with the question of physical custody of the child,

pending the resolution of adoption issues, this Court generally orders the preservation of the status quo when it poses no threat to the child. The preservation of the status quo pending the Derzacks' appeal of this Court's Order of January 17, 1996, however, was not available to this Court, because of the reasons stated above and because of this Court's belief that the Derzacks were under great stress due to the legal and financial problems brought to the attention of this Court during the contempt hearings. It was undisputed on the record of the January 17, 1996 hearing that (1) Karen Derzack required police assistance to locate Michael Derzack in December 1995 when he disappeared for several days, after a period of heavy drinking, following the first contempt hearing and to locate him in January 1996, after he stormed out of the home, intoxicated, following a verbal domestic dispute with Karen Derzack, (2) the Derzacks have a pending bankruptcy case and possible Internal Revenue Service litigation, both of which bespeak the precarious nature of the Derzacks' financial situation and (3) the Derzacks'

petition for adoption was denied based upon the false information contained therein, thus giving them no standing to object to the removal of the children into the custody and care of CYS.

This Court determined that there was an imminent threat to Byron and Byrae's welfare, if returned to the Derzacks and, therefore, refused to stay its Order removing the children, pending the outcome of the Derzacks' appeal. Concerned about the welfare of the children, CYS was ordered by this Court to immediately remove the children from the courthouse following the January 17, 1996 hearing and place them with new, prospective adoptive parents.

In spite of the emotional investment and the grievous loss being experienced by the Derzacks, the welfare of the children remains this Court's paramount concern. While it is true that Byron and Byrae will be required to make adjustments to their removal from the Derzacks' home and placement in a new home, studies reflect, and this Court has observed, that children much

older than Byron and Byrae adjust successfully to favorable - though new - environments. According to generally accepted views on child-development, the benefits to Byron and Byrae of being removed from the Derzacks' home and being placed in a home where they can grow up in obscurity, free to visit with siblings and loved ones, while receiving proper care and therapy, should be clear, unequivocal and significant.

Best interest of the children.

This case is not the Commonwealth versus the Derzacks. Three parties are involved: the Commonwealth, the Derzacks and the children and it is the welfare of the children that is the Court's primary consideration. In reviewing the hearing records and prior medical and CYS reports and recommendations with the welfare of children as the primary consideration, this Court unanimously found that it was in the best interest of Byron and Byrae to be removed from the custody and care of the Derzacks and placed with another pre-adoptive family.

Once parental rights have been terminated, ether by consent or involuntarily, the best interest of the child becomes the standard by which the court must be guided when placing the child for adoption. McMillen v. McMillen, 529 Pa. 198, 602 A.2d 845 (1992); In Re Miller, 380 Pa. Super. 423, 552, A.2d 261 (1988). When it is found, prior to the finalization of the adoption, that a placement is not in the best interest of the child, the placement must be terminated.

When Byron and Byrae were placed into the foster care system, it was not the intent of CYS or the Court to transfer them from social worker to social worker and from family to family without ever allowing them to experience the love, affection, stability and sense of belonging to necessary for normal development. CYS initially worked toward a reunification of Mother with Byron and Byrae. In spite of the support of CYS and various agencies, Mother could not overcome her drug addiction and provide the care and protection necessary for the survival of Byron and Byrae. Recognizing that a permanent reunification

was not foreseeable, the parental rights of Mother were terminated as to Byron and Byrae, in 1995. With Mother's parental rights terminated, Byron and Byrae assumed the status of legal orphans. This Court, believing that adoption not orphancy was in the best interest of both children, directed CYS to assist the Derzacks in preparing their application to adopt Byron and Byrae.

With adoption of Byron and Byrae by the Derzacks as its goal, this Court, by evaluating CYS recommendations, medical practitioners' reports and court testimony, determined that it was in the best interest of Byron and Byrae to:

1. maintain an ongoing relationship with Mother, paternal grandmother, maternal great aunt, siblings and other approved relatives,

2. be kept out of the public eye and permitted to grow up in obscurity,

3. receive professional therapy and counseling to ameliorate the effects of their early physical, emotional and psychological abuse; drug addictions and separation from Mother and natural relatives,
4. receive Court permission to be taken out of the jurisdiction,

5. be visited on a regular basis by their CYS caseworker to have their care and adjustment monitored, and

6. be observed by a medical practitioner for evaluation of interactional visits with Mother, relatives, siblings and the Derzacks.

Appropriate orders were issued from October 5, 1994 to October 13, 1995 as mandates which were intended to be supported and carried out by the Derzacks. The Derzacks, however, defiantly chose not to comply with this Court's orders and unilaterally decided to (1) stop the children's visitations with their natural family and relatives, (2) deny the children psychological therapy, (3) use the children as media and career opportunities, (4) co-write a book about Byron, (5) bar CYS from visiting and monitoring the children's adjustment and care and (6) travel with the children outside of the jurisdiction of the Court without prior CYS or court approval. This Court finds that CYS' decision to abrogate the placement of Byron and Byrae with the Derzacks was justified under the best interest of the child standard.

Juvenile Court Jurisdiction over the Matter.

The basis for the Derzacks' challenge to this Court's jurisdiction is unfounded. In Pennsylvania, the law is well-settled that Juvenile Court, through CYS, is responsible for establishing permanency in the lives of long-term foster care children whose natural parents' parental rights have been terminated.

CYS, the agency to which Byron and Byrae were relinquished for adoption by the Court, has legal custody of the children and is responsible for their care at all times until a decree of Adoption is entered by the Court. Any placement for temporary care or for adoption made by CYS may be terminated at the discretion of the Court or CYS at any time prior to the Decree of Adoption.

The legislation intended to elevate the placement agency's discernment of danger above the interests of prospective adoptive parents. In the event of termination of a placement for temporary care or for adoption, the child is returned promptly to the physical custody of CYS, as the Commonwealth has an ongoing interest in

immediate removal of a child from a placement wherein a child's welfare is endangered.

Recusal of Honorable Cheryl Allen Craig.

At the reconvened hearing held on January 17, 1996, the Derzacks presented a *"Motion to Recuse The Honorable Cheryl Allen Craig from the Court En Banc Empaneled December 13, 1995"* which read in pertinent parts as follows:

> 3. The above-noted action was filed, partially, based upon the violation of the constitutional rights of Karen Derzack and Michael Derzack because of a policy adopted by Children and Youth Services and the County of Allegheny on May 15, 1992, captioned "Children and Youth Services Transracial Placement Policy".
>
> 7. The correspondence identified as Exhibit "122" was a letter from Mary C. Young to the Honorable Cheryl Allen Craig requesting that Judge Craig review the Children and Youth Services Transracial Placement Policy. Ms. Young in her letter specifically states:
>
> > "Thanks for agreeing to look at it. Any feedback will be greatly appreciated. This came about because of our concern of Black children being displaced in white homes and the impact of such placement upon their lives. Vic, therefore asked me to head a committee to develop a policy.

Additionally, in the deposition of Ms. Young (pages 142-146 attached as Exhibit "B"), when Ms. Young was queried as to whether or not Judge Craig responded to the letter of February 14, 1991, Ms. Young responded "She did not".

9. Because of the basic issue involved in the action filed in the United States District Court for the Western District of Pennsylvania which deals with the constitutional questions of a policy not permitting white persons to adopt black children, and because it is apparent that the Honorable Cheryl Allen Craig had the opportunity to review said policy, it is suggested by the undersigned that the Honorable Cheryl Allen Craig cannot be neutral or detached with respect to issues currently before the Court En banc.

Race is not at issue in the matter before this Court. The only issue before this Court is whether the Derzacks violated any or all of the eight Orders of Court entered by this Court between October 5, 1994 and October 13, 1995. The Derzacks wish this Court to believe that Judge Craig is somehow impaired from hearing this case as a member of the Court en banc, because she was sent a draft copy of a policy discouraging the adoption of children by parents who are not of the same race as the children whom they intend to adopt, although there is no evidence that the draft copy of the policy was read by Judge Craig

or that Judge Craig even supports a transracial placement policy.

The Derzacks failed to present a scintilla of evidence to support a finding that Judge Craig has a bias or prejudice that would render her unable to make fair and impartial decision in this case. Instead, the Derzacks appear to be attempting to cast a shadow over these proceedings by implying that Judge Craig cannot be impartial in her deliberations because she shares the same racial heritage as Byron and Byrae. Such thinking is not only unfounded, it bespeaks deep rooted bigoted feelings and attitudes which may be harbored by the Derzacks. This Court finds no reason why Judge Craig could not render a fair and impartial decision in this case.

Recusal of a judge is not automatic. The Code of Judicial Conduct, including provisions dealing with disqualification, does not have the force of substantive law, but rather, imposes standards of conduct upon the judiciary to be referred to by a judge in his/her self-assesment of whether he/she should volunteer to recuse

himself/herself from a matter pending before him/her. The rules of judicial conduct do not give standing to others to seek compliance or enforcement of the Code. Reilly v. Southeastern Pennsylvania Transportation Authority, 489 A.2d 1291, 507 Pa. 204 (1985).

The law of recusal is well settled that a Judge shall not be required to disqualify himself/herself from hearing a case unless he/she has a bias or prejudice or the facts surrounding the case would convince a reasonable person that the judge could not be impartial. United States v. Thompson, 483 F.2d 527, 528 (3d Cir. 1973), 28 U.S.C. 455 (1974), as amended. The law further states that the party petitioning the Court for disqualification of a trial judge bears the burden of producing evidence establishing the bias, prejudice, unfairness or partiality necessitating recusal. Feingold v. Hall, 521 A.2d 33, 360 Pa. Super. 539 (1987), appeal denied 529 A.2d. 108, 515 Pa. 607.

The fact that Judge Craig was sent a draft copy of CYS' transracial placement policy on February 14, 1991 to review, establishes a finding of "nothing". A fact which

any reasonable person must conclude based upon the Derzacks' admission:

> ". . .when Ms. Young was queried as to whether or not Judge Craig responded to the letter of February 14, 1991, Ms. Young responded, "She did not".

This Court is, therefore, unable to find, from the facts set forth in the Derzacks' motion to recuse Judge Craig, the slightest ground for questioning Judge Craig's ability to be impartial in this case.

Reviewing Courts refuse to disqualify judges on the basis of their general background, education and experience. Blank v. Sullivan, 418 F. Supp. 1 (S.D.N.Y. 1975). Blank was a sex discrimination case against a law firm. In Blank, the defendant sought to disqualify the judge because she was female and as a lawyer had worked on behalf of minorities who had suffered from discrimination. The Blank Court refused to disqualify the judge, reasoning that, if background, race or sex were of themselves grounds for removal, "no judge on this Court could hear this case, or many others, by virtue of the fact

that all of them were attorneys, of a sex (and) often with distinguished law firms or public service background."

In Pennsylvania v. Local 542 Internation Union of Operating Engineers, 388 F.Supp. 155, 182 Pa. 1974, aff'd 552 F.2d 498 (3rd Cir. 1977), the defendant's central allegation was that Judge Leon Higginbotham, an African-American, had recently spoken before a Black History organization and revealed his identification with civil rights cases. In addition to refusing to disqualify Judge Higginbotham on the grounds that background and association could not be used to prove bias, the Court noted that dedication to upholding the law also could not be used to disqualify a judge. Id, at 159. The court in Cipollone v. Liggett Group, Inc., 802 F.2d 658, 569-60 (3d Cir. 1986), cert. denied, 107 S.Ct. 907 (1987) recently observed, "If judges could be disqualified, because their background in the practice of law gave them knowledge of legal issues which might be presented in cases coming before them, only the least-informed and the worse-prepared lawyers could be appointed to the bench."

This Court has no explanation why the Derzacks singled out Judge Craig for recusal, as all judges in Juvenile Court are from time to time called upon the review drafts of documents and policies prepared by CYS and other agencies. The presumption held by the Derzacks that Judge Craig could not be impartial in ruling in a case where she was asked to read a draft of a document which is not at issue and, even if it were at issue, would not be grounds for recusal, is not only lacking in reasonableness, but represents an attitude which is unacceptable in this Court.

The Court en banc concurs with Judge Craig in denying the Derzacks' *"Motion to Recuse The Honorable Cheryl Allen Craig from the Court En Banc Empaneled December 13, 1995"*.

CONCLUSION

For the reasons set forth above, this Court finds the Derzaks in contempt of eight Orders of Court entered

from October 5, 1994 to October 13, 1995. An appropriate Order was entered denying the Derzacks' Petition for Adoption and removing Byron and Byrae from the custody of Karen Derzack and Michael Derzack.

BY THE COURT:

/s/ Cheryl Allen Craig, Judge

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION - JUVENILE SECTION

IN RE:	:
	: HISTORY
BYRON TODD GRIFFIN a/k/a	: NUMBERS
BYRON TODD JEFFREY	: 34333-A & 34333-E
AND	: DOCKET
BYRAE LAFAY GRIFFIN a/k/a	: NUMBERS
BYRAE LAFAY JEFFREY,	: 2608-91 & 1608-92
MINORS.	:

OPINION

JAFFE, J.

I join in the Majority Opinion and write separately as the Family Division, Juvenile Section Judge originally assigned to this case. I have presided over all matters related to this case since 1991. I requested that my colleagues, Judge Max Baer, Administrative Judge of the Family Division, and Judge Cheryl Allen Craig of the Juvenile Section, sit with me en banc to hear the most recent matter, since I was transferred effective January 22, 1996, by order of Judge Robert E. Dauer, President Judge of the Court of Common Pleas of Allegheny

County, to the Civil Division of our Court and may no longer preside over the case.

In October 1994, this Court ordered that Karen and Michael Derzack be granted custody of Byron and Byrae Griffin, a/k/a Jeffrey. Mr. and Mrs. Derzack are the foster parents with whom Byron had been placed immediately after his birth. Marion Ellis, the paternal great-aunt of the children, with whom they had been temporarily residing for the four months prior to the entry of the custody Order, appealed the Order to the Pennsylvania Superior Court. That appeal is currently pending before the Superior Court. In July, 1995, I entered a Decree terminating the parental rights of the children's mother, LaShawn Jeffrey, to Byron and Byrae. Mother appealed my Order and that appeal is also currently pending before the Superior Court.

The remainder of the extensive history of this matter is set forth at length in the Opinions I filed in connection with each of the above referenced appeals. The matter before us currently was initiated by Children and Youth Services (hereinafter "C&YS") upon their

Petition for Contempt, alleging that Karen and Michael Derzack violated several of this Court's Orders relating to the care of Byron and Byrae and requesting the immediate removal of the children from Karen and Michael Derzack's custody. On December 13, 1995, a hearing was held before this en banc panel on the Petition for Contempt filed by C&YS. During the hearing, the evidence presented by C&YS clearly established serious violations of several Orders of this Court which directly affect the best interests of Byron and Byrae.

As set forth at greater length in the Majority Opinion, the first violation of this Court's Orders relating to Byron and Byrae's care occurred when Karen and Michael Derzack refused to permit the C&YS adoption caseworker, Timonthy Jashinski, to visit the children for a period of several months beginning in August, 1995. Mr. and Mrs. Derzack eventually permitted Mr. Jashinski to visit a couple of times but only when they were faced with the possibility of the removal of the children as a consequence of the instant contempt action (Tr. At 13-20). The

Derzacks' refusal to allow Mr. Jashinski to perform his monitoring function was a clear violation of this Court's Orders of May 9, 1995 and October 13, 1995, and prevented C&YS from determining the nature of the children's adjustment to the Derzack home and more importantly, whether the children were being properly cared for and were safe(Tr. at 21).

Second, Karen and Michael Derzack refused to permit the children to participate in the court-ordered visits with their siblings and their great-aunt, Marion Ellis. Mr. Jashsinski testified that since August, 1995, Mr. and Mrs. Derzack either refused to permit Byron and Byrae to attend the scheduled visits or insisted on being present during the visits which resulted in the visits being cancelled (Tr. at 29-30). Their conduct is in direct violation of this Court's Order of April 12, 1995 and also the Consent Order of August 14, 1995 in which this Court specifically prohibited Mr. and Mrs. Derzack from "observing, attending or participating" in the visits with the siblings and Mrs. Ellis. The Consent Order also provided

that any visits which had no occurred on the regularly scheduled dates were to be made up (Tr. at 35).

Third, in violation of the Orders of October 6, 1994 and May 9, 1995, Karen and Michael Derzack prohibited the children from receiving psychological therapy (Tr. at 38-44). Mr. Jashinski testified that although the Derzacks initially secured therapy for the children with Dr. Debbie Klosterman, they abruptly cancelled the therapy when they discovered that Dr. Klosterman had met with the County Law Department regarding payment for her services (Tr. at 40-41). Again, in anticipation of the October 13, 1995 contempt hearing, the Derzacks partially complied with the therapy Order by taking Byron to see Dr. Klosterman on one occasion, but that occurred some three months after they had terminated the therapy for both children (Tr. at 42).

Fourth, the Derzacks acknowledge that they appeared on no less than four nationally televised talk shows, including the Montel Williams Show, Leeza, The Ricki Lake Show and most recently, the Sally Jesse

Raphael Show which aired on December 5, 1995 (Tr. at 44-50, 112, 120-123, 135-137). Despite their assertions to the contrary, it is a matter of public record that they did discuss the circumstances of their case on those shows and on one occasion, even permitted the children to be paraded in front of the television cameras (Tr. at 121-123). Their actions constituted clear violations of this Court's Order of November 14, 1994 prohibiting them from discussing the case publicly. Moreover, in transporting the children to California for the appearance on the Leeza Show, Mr. and Mrs. Derzack failed to obtain the permission of C&YS to remove the children from Allegheny County, once again in violation of a Review Order of this Court dated October 5, 1994 (Tr. at 40-50).

Finally, though she initially denied it, Karen Derzack was forced to acknowledge that she had falsely answered a question on the Petition for Adoption she and her husband had filed for Byron and Byrae on August 8, 1994. The Petition form asked whether she had ever received professional counseling or therapy and she

responded no (Tr. at 56-57). However, during her testimony, Mrs. Derzack stated that she had informed Dr. Patricia Piercy during a court-ordered evaluation that she had a psychiatric history (Tr. at 116). During a subsequent continuation of the Contempt Hearing held before this Court en banc on January 17, 1996, her attorney, Arthur Bloom, Esquire, stipulated in court that she had indeed received psychiatric treatment in the past for an eating disorder.

It was also revealed during the hearing of December 13, 1995, that Michael Derzack may have provided false information on the Adoption Petition regarding the family's income. When asked whether he indicated yearly income for the year of 1994 of $168,000 on the form, Mr. Derzack refused to answer the question on the basis of his Fifth Amendment right again self-incrimination (Tr. 129-130). When asked whether he gave the Internal Revenue Service different income figures for the same year, Mr. Derzack again asserted his Fifth Amendment privilege (Tr. at 139). Mr. Derzack's assertion

of his Fifth Amendment privilege indicates to this Court that he either lied to the Internal Revenue Service or to the Court which would have reviewed the Adoption Petition. In either instance, his intentional misrepresentation renders him ineligible to serve as an adoptive parent.

Beyond the violations of the Court Orders, I was astonished by the deceit and boldness exhibited by both Karen and Michael Derzack during their testimony at the hearing. Both repeatedly either flatly denied violating the Orders or claimed a lack of recollection of the events when faced with indisputable evidence of the violations. Furthermore, and most significantly, when asked whether she would abide by the Court Orders in the future, Mrs. Derzack stated "I can't speak for the future" (Tr. at 125).

The violations of the Court Orders alone may be sufficient to remove the children from the care of Mr. and Mrs. Derzack, but the violations, taken together with this couple's contemptuous behavior at the hearing, lead me to conclude that the children must be removed from their care and be placed in a suitable pre-adoptive home.

The decision I made in October 1994, placing Byron and Byrae in the custody of Karen and Michael Derzack was a very difficult one. The psychological bonds between Byron and the Derzacks and between Byron and Byrae were the critical factors in my decision. However, after listening to the evidence presented of the very disturbing and harmful changes in the behavior and the attitude of the Derzacks during the hearings, I am now firmly convinced that the children's best interest no longer will be served by remaining in the care of Karen and Michael Derzack.

While I recognize the emotional harm which may occur in removing the children from the individuals with whom they have a psychological bond, their best interest must be considered foremost. I believe that the pain which they may suffer in the initial stages of resettling with a new family is outweighed by the long-term harm they would suffer by remaining with foster parents who are unstable and who have made it clear to this Court that they will not be monitored or controlled by this Court. The

risk to the children is that they will continue to be paraded around the national talk show circuit, supplying the Derzack's apparent overwhelming appetite for fame. This case will not be forgotten and the children will be unable to settle into the stable, anonymous lives they so desperately deserve.

If they remain in the Derzacks' care, Byron and Byrae would also be unable to maintain a relationship with their siblings and other relatives with whom they are psychologically bonded and with whom they share, most significantly, their ethnic heritage. Dr. Patricia Piercy, the court-appointed psychologist, strongly recommended that Byron and Byrae continue to maintain a relationship with those family members.

Finally, the fact that both Karen Derzack and apparently, Michael Derzack as well, provided false information on the Adoption Petition disqualifies them from being approved as adoptive parents for Byron and Byrae. In light of this information, to permit the children to remain in a home from which they undoubtedly will be removed

when a suitable pre-adoptive home is found for them certainly would not be in their best interest. Dr. Piercy made clear in her testimony in a previous hearing that Byron and Byrae desperately need stability and permanence in their lives now and in the future. It is clear from the actions of Mr. and Mrs. Derzack that Byron and Byrae will achieve neither if they are left in the care of the Derzacks.

Date Filed: April 1, 1996

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION - JUVENILE SECTION

IN RE:	:	
	:	History No. 34333 A-E
BYRON & ANDRE JEFFREY:		Docket No. 1608-92
SHONDRE & WESLEY	:	2622-25-91
BARNES, AND	:	
BYRAE GRIFFIN.	:	

ORDER OF COURT

JAFFE, J.

AND NOW, to-wit, this 6th Day of October, 1994, it is hereby ORDERED and DECREED as follow:

Andre Jeffrey, and Wesley and Shondre Barnes shall remain with their maternal great-aunt, Marion Ellis. Mother's visits with these children are to be supervised by Children & Youth Services (hereinafter "CYS) and materna great-aunt. Pursuant to the commendation of the Cout Appointed Special Advocate (hereinafter "CASA")and the home evaluator's testimony, these children are to be evaluated and receive follow-up counseliig services concerning sexual abuse and mental health issues. Additionally, pursuant to the

recommendation of Dr. Patricia Piercy, these children and their custodian are to have significant follow-up services concerning the issues of sibling visitation and the distress of separation, including but not limited to in-home services and mental health counseling.

Byron and Byrae Griffin are to be placed in the custody of adoptive foster parents, Mr. and Mrs. Michael Derzack immediately. Mother's visits are to be supervised by CYS. Paternal grandmother's visits are to be supervised at first by CYS and then expanded to partial custody to be loosely supervised by CYS. CYS is to determine when paternal grandmother is stable enough to begin less restrictive partial custody. Sibling visits among the five children are to be frequent and supervised by CYS. Mother may visit during this time with CYS supervision. The frequency and length of these visits are to be determined by the agreement of the parties and by the professionals involved in the therapeutic intervention concerning separation and loss, sexual and mental health counseling.

This foster care placement is pursuant to the Juvenile Act, is confidential and shall respect the individual rights of privacy of Byron and Byrae.

Case is continued to April 5, 1995; all intervening review dates are cancelled.

BY THE COURT:

/s/Jaffe, J.

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA
FAMILY DIVISION - JUVENILE SECTION

IN THE INTEREST OF:

BYRAE & BYRON GRIFFIN
HISTORY NUMBER 34333
DOCKET NUMBER 2625 1991

CYS: Jashinski

ON this 17th day of January, 1996. . .

It is hereby ordered that permission to place in adoptive foster care and reviewed on March 20, 1996 before Judge Jaffe.

/s/Jaffe
Judge

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

IN THE INTEREST OF:

BYRAE LAFAY GRIFFIN
a/k/a BYRAY LAFAY
JEFFREY and BYRON
TODD GRIFFIN a/k/a
BYRON TODD JEFFREY,

Minors.

FAMILY DIVISION
JUVENILE SECTION

HISTORY NOS. 34333-D
and 34333-E
DOCKET NOS. 2625-91
and 1608-92

Before the Honorables
JOSEPH A. JAFFE
MAX BAER
CHERYL ALLEN CRAIG
3333 Forbes Avenue
Pittsburgh, PA 15213

HEARING OF
WEDNESDAY,
JANUARY 17, 1996

Official Court Reporter:
LAURIE KASARDA
(412) 350-5823

APPEARANCES

On behalf of Children and Youth Services:
WENDY L. VAUPEL, ASSISTANT COUNTY SOLICITOR

On behalf of the Derzacks:
ARTHUR BLOOM, ESQUIRE

On behalf of the Minors:
GEORGENE SIROKY, ESQUIRE

On behalf of Marion Ellis:
ARNOLD CANTOR, ESQUIRE

. . .

ATTORNEY BLOOM: The final motion, Your Honors, is for a continuance of this hearing that is before this Court. I recite various circumstances, Your Honor, with respect to the procedures filed on behalf of Allegheny County Children and Youth Services. The first filed by Ms. Vaupel with respect to a petition for contempt and followed by a motion—a motion to amend the petition. And, secondly, an amended motion.

As a result of the previous motions filed by Ms. Vaupel, the Court ordered and we did have a hearing on December 13, 1995. In the mail on January 12, 1996, I received a notification classified as on order dated January 10, 1996 ordering what was captioned a brief hearing to be scheduled for today, Wednesday, January 17, 1996, indicating that any party may present relevant testimony on issues that may have arisen since the last hearing on December 13, 1995.

The day after I received what was stated as a corrected order of court removing the words "brief hearing"

and indicating that a continued contempt hearing will be held on January 17, 1996, again stating that any party may present relevant testimony.

On December 10—I'm sorry, that should be January 10—I received a phone call from Ms. Vaupel indicating that she had been contacted by the scheduling office for the Court of Common Pleas to determine whether or not I would be available for a hearing on January 17 before this court en banc. When I questioned Ms. Vaupel as to why, she indicated she had no idea why this hearing was being scheduled.

Subsequently, I must indicate that if this hearing is because the Court has after-discovered evidence that the Court has found, I don't believe that the tribunal is permitted to bring into this case information or an investigation that they may have completed. If, in fact, it is information that's being presented to this tribunal with respect to after-discovered information that the county law department has located, and obviously there were two or three witnesses sworn in here this morning, the county law

department had to have had or somebody had to have had contact with this tribunal indicating that there is after-discovered evidence.

I would suggest to the Court that that is an ex parte communication. We have no idea what evidence is to be presented at this hearing. As I sat down this morning some ten minutes after I was here, Ms. Vaupel handed me two incident reports from the Pine Township Police. That is the first knowledge I have without any equivocation as to what might be coming before this panel today.

There is no element of surprise under Pennsylvania rules of Civil Procedure, Your Honors. I do not have an opportunity to properly defend on behalf of my clients without knowing what is to be brought before this Court. There were significant petitions filed by Ms. Vaupel in which she outlined previously what contempt issues were going to be argued at the December 13, 1995 hearing. I don't have that opportunity. All I have is an order of court initially telling me it was a brief hearing to be scheduled and then a continued contempt hearing was to

be scheduled. I don't have the opportunity to defend on behalf of my clients.

Therefore, Your Honors, I would request that this order of court be signed granting a continuance requiring the Allegheny County Law Department to present a proper petition itemizing what contempt actions there are against my client occurring after December 13, 1995. That was what the previous order had indicated.

(Tr. 14-17)

. . .

JUDGE JAFFE: . . .It cannot be—Essentially there is a 50-50 chance at best for a successful interracial placement. That's what the literature indicates, all the writing and research that we have done. At best it is a 50-50 chance.

Based upon the testimony from all of the hearings, based upon what's happened on December 13 and today, I feel that those odds have been so drastically lowered that it can't possibly be in the best interest of these kids to

remain there. And that's the basis of me joining with my colleagues for a 3-0 vote for removal.

. . .

JUDGE CRAIG: . . .These are children who were born into difficult circumstances. They are children who are desperately in need of stability and permanency. And my review of this record since the December 13 hearing led me to the conclusion that the stability is not there. . .

. . .

JUDGE BAER: . . .My concurrence is provided reluctantly, and only after the most careful weighing of all of the facts and totality of this record. Not merely what was heard before us in December and today, but also what was heard before Judge Jaffe, which was incorporated by reference into this record.

(Tr. 73-78)

QUESTIONS PRESENTED FOR REVIEW

I. WERE THE BEST INTERESTS OF THE CHILDREN SERVED BY REMOVING THEM FROM THE ONLY LOVING AND STABLE FAMILY THEY HAD KNOWN WHERE IT WAS ALLEGED, ON MISREPRESENTED FACTS, THAT THE PROSPECTIVE ADOPTIVE FAMILY HAD VIOLATED SEVERAL COURT ORDERS BUT THERE WAS NO EVIDENCE THE CHILREN HAD SUFFERED ANY HARM

Answered in the negative by the court below.

II. DID IT VIOLATE DUE PROCESS OF LAW TO REMOVE TWO CHILDREN FROM A PROSPECTIVE ADOPTIVE FAMILY WHEN NO NOTICE WAS PROVIDED TO THE FAMILY THAT PLACEMENT OF THE CHILDREN WOULD BE ADDRESSED AT THE COURT HEARING RESULTING IN THE REMOVAL ORDER

Implicitly answered in the negative by the court below.

III. DID THE LOWER COURT LACK JURISDICTION TO ALTER THE PLACEMENT OF TWO DEPENDANT CHILDREN WHEN THE PLACEMENT ORDER WAS THE SUBJECT OF TWO PENDING APPEALS BEFORE THE SUPERIOR COURT

Answered in the negative by the court below.

Supreme Court, U.S.
FILED
FEB 4 1998
CLERK

No. 97-1105

In The Supreme Court of the United States

OCTOBER TERM 1997

KAREN and MICHAEL DERZACK,

Petitioners,

v.

ALLEGHENY COUNTY CHILDREN AND YOUTH SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

THE SUPERIOR COURT OF PENNSYLVANIA DID NOT ABUSE ITS DISCRETION BY REJECTING PETITIONERS' CLAIM THAT THEY WERE DENIED DUE PROCESS OF LAW PURSUANT TO THE LOWER COURT'S REMOVAL OF TWO FOSTER CHILDREN FROM THEIR CARE.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. Introduction

This fact-based case concerns the court-ordered removal of two foster children, Byron and Byrae Griffin, from the home of foster parents, Michael and Karen Derzack (the Derzacks). A three-judge panel of the Juvenile Court removed the children from the Derzacks' care on January 17, 1996 after hearing extensive testimony on two separate occasions concerning the Derzacks' flagrant violations of several court orders. The Superior Court of Pennsylvania upheld the lower court's decision to remove the children based upon the Derzacks' violations of court orders which prohibited them from exploiting these children through the media including tabloid television, refusing to allow a Children and Youth Services (CYS) caseworker to visit the children, terminating the children's psychological therapy, refusing to correct false statements on their adoption application and petition concerning Mrs. Derzack's mental health history and the couple's annual income, leaving the jurisdiction without permission and interfering with court-ordered visitation with the children's natural relatives. The Superior Court agreed that the Derzacks' violations were

harmful to these children and that their best interests were served by removal and placement in a pre-adoptive home.

B. Procedural History

Byrae and Byron were born drug-addicted to LaShawn Jeffrey on July 20, 1991, and July 15, 1992, respectively. Their natural father, Todd Griffin, is deceased. (3A)[1]

Byron was initially placed with the Derzacks shortly after his birth. (5A) Byrae was placed with relatives. (4A) Byrae was eventually reunited with her natural mother in June of 1993 and Byron was removed from the Derzacks by court order and reunited with his mother in December 1993. (8A)

On October 6, 1994, the lower court placed Byron and Byrae with the Derzacks as potential adoptive parents after their natural mother relapsed by using crack cocaine. (10-11 A) In April of 1995, their natural mother's parental rights were involuntarily terminated by the lower court. (12A)

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[1]The designation "A" preceded by page numbers indicates location in the Appendix to the Petition for Writ of Certiorari.

From April of 1995 through December of 1995, the Derzacks violated a series of eight (8) court orders designed to protect the children's best interests. (9-15A)

Pursuant to the Derzacks' flagrant, pre-meditated violations of these court orders, CYS filed four (4) contempt petitions with the lower court over a period of several months. (26 A)

In the last petition, which was properly served upon all parties on December 6, 1995, CYS asked the lower court to determine whether placement with the Derzacks was in the best interests of Byron and Byrae. (26 A)

A contempt hearing was held on December 13, 1995. At that hearing, CYS demonstrated that the Derzacks had terminated the children's visits with their natural relatives, exposed the children to several tabloid television talk shows, prohibited CYS from visiting with and monitoring the children, travelled with the children to the state of California without court or CYS permission, unilaterally terminated the children's psychological therapy and provided false statements on their adoption application and petition. (30-32 A)

At the December 13, 1995 hearing CYS requested the children be removed from the Derzacks' care, arguing that

their best interests were not served by this family and that they were unfit to adopt them. (28A)

At a second scheduled hearing held on January 17, 1996, Pine township Police Officers testified to two incidents in November and December of 1995 of reported intoxication on the part of Mr. Derzack. A CYS caseworker testified once again to his concerns for Byron and Byrae living with the Derzacks. (74-75 A)

At the conclusion of the January 17, 1996 hearing, the lower court removed the children and placed them in a pre-adoptive home. (154 A)

The Superior Court of Pennsylvania, in a thorough and well-reasoned opinion, denied the Derzacks' appeal on February 19, 1997 flatly rejecting any alleged due process violation. (24-28 A)

The Supreme Court of Pennsylvania refused to grant the Derzacks' Petition for Allowance of Appeal of the Superior Court's order on September 8, 1997. (1 A)

The children were adopted on December 16, 1997 by their pre-adoptive foster family where they have now resided for over two years.

REASONS FOR DENYING THE PETITION

Rule 10 (a)-(c) of the U.S. Supreme Court Rules outlines the "...character of the reasons [this] Court considers" in granting a review of a writ of certiorari as follows:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower Court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Subsection (a) of Rule 10 is not applicable to this Petition as this case is a state court case and not a United States court of appeals decision.

Subsection (b) is not applicable here. Though the Derzacks allege a violation of due process, this fact-based case is not the case upon which this Court should determine the threshold federal question of whether the due process protections of the Fourteenth Amendment include foster parents. Neither is the lower court's decision here in conflict with any state court of last resort, nor of a United States court of appeals.

Subsection (c) is not applicable because the Superior Court's decision to uphold the lower court's removal of two foster children from the care of the Derzacks is not an important federal question that should be settled by this Court, nor does the Superior Court's decision conflict with any relevant decisions of this Court. In fact, the

Superior Court's decision is in accordance with relevant decisions of this Court. *See* Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 97 S. Ct. 2094 (1977) *infra.* And, as outlined below, the peculiar facts of this case argue against this Court granting certiorari to determine whether foster parents have a "liberty" interest in their foster children, and correspondingly, what process is due.

Pursuant to the dictates of the above rule, Respondent, Allegheny County Children and Youth Services presents the following reasons in support of its request to deny the Derzacks' petition.

A. Substantive Due Process

The Derzacks argue that they have a fundamental liberty interest in the care and custody of two foster children pursuant to the Fourteenth Amendment to the United States Constitution which states in part..."nor shall any State deprive any person of life, liberty, or property, without due process of law." They cite no authority for this argument, but suggest that their interests are akin to those of a natural parent. They attempt to buttress their fallacious argument by citing Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982), however, the due process protections outlined in

Santosky apply to natural parents, not foster parents nor adoptive foster parents. The Court also stated that the nature of due process was a balancing of the private interests of the natural parent, risk of error in the deprivation by the state and the countervailing government interest in the best interests of the child. *Id.* at 754. The Derzacks cite no authority for the balancing of those interests here.

Though Santosky clearly applies to the "liberty" interest that biological parents have in their children, do foster parents have any asserted interests within the "liberty" protected by the Fourteenth Amendment? This Court spoke narrowly on this issue in Smith v. Organization of Foster Families for Equality and Reform, *supra*, 431 U.S. 816 (1977). In Smith, this Court declined to expand to foster parents a constitutionally protected liberty interest stating that "... there are also important distinctions between the foster family and the natural family...[T]he State...seeks to interfere, not with a relationship having its origins entirely apart from the power of the State, but rather with a foster family which has its source in state law and contractual arrangements." at 845, 2110. In addition, this Court denied an application for writ of mandate by a couple seeking reinstatement as prospective adoptive parents after the state had removed the child without notice in the child's best interests. Martin v. Thies, 446 U.S. 1320, 100 S.

Ct. 1744 (1980). Clearly, based upon the above authorities, the Derzacks have no fundamental liberty interest in these children and their substantive due process argument must fail.

B. Procedural Due Process

Even if one assumes *arguendo* that foster parents have a limited constitutionally protected liberty interest in their foster children, the Derzacks were provided with more than adequate notice and an opportunity to be heard before the lower court removed the children. As the Smith Court noted, "[i]t is true that '[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing....' " *Id.* at 848, 2111. The Derzacks make the specious claim that they had no notice that these children could be removed from their care, and that they had no opportunity to defend themselves. The Superior Court of Pennsylvania flatly rejected their claim.

Initially, the Superior Court noted that the Derzacks entered the case as foster parents who were on notice that the state agency has the authority to remove a child at any time. (A.25).

The Superior Court went on to illustrate that Byron had been removed from the Derzacks in December of 1993 in order to be reunited with his natural mother. The Derzacks,

who were at that time considered to be prospective adoptive parents by the court, never challenged that order on due process grounds because they knew the Juvenile Court had the power to remove the child. (26A)

Indeed, the Derzacks do not deny that the Juvenile Court has broad authority to adjudicate in the best interests of dependant children pursuant to 42 Pa. C.S.A. Section 6301 *et. seq.* which must include the power of removal. As the Superior Court noted, [w]ithout that power, Juvenile Court's authority would be illusory." (27A). As further evidence that the Derzacks were well aware that removal of these children was an option, the Superior Court next stated that no less than four contempt petitions were filed against the Derzacks for their violations of court orders from July 1995 to December 1995. (26 A) In fact, the final contempt petition served prior to the December 1995 hearing asked the court to make a determination whether placement with the Derzacks was in the best interests of these children.

The Superior Court further found that the Derzacks' claim of lack of notice was not credible, because the lower court specifically discussed the issue of removal at the court hearing held December 13, 1995. (28 A) In fact, the Derzacks' own attorney argued that removal would not be in the best interests of the children. (28A). Thus, their specious

arguments are plainly disingenuous, and do not comport with the facts.

Finally, the Superior Court found that the Derzacks were represented by competent counsel at the December 1995 and January 1996 contempt proceedings and "...were provided every opportunity to explain or defend their conduct." (28A) Indeed, the Derzacks testified extensively and mounted a vigorous defense of their obdurate conduct in two separate hearings. In fact, both the Juvenile and Superior Courts found that the Derzacks' testimony was "coy and evasive" and that it subjected the lower court to ridicule. (35-36 A) Having failed to do so adequately, [the Derzacks] cannot now complain that they were unaware of the intended purpose of the contempt hearings or that they were denied the opportunity to be heard. (28A).

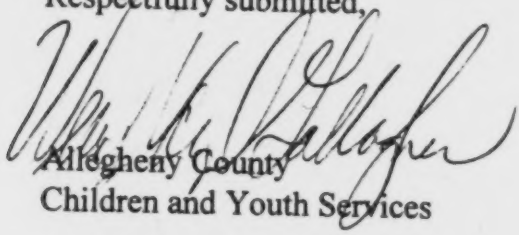
Truly, one is left wondering how the Derzacks can believe that they can rehabilitate themselves, after testifying in the face of overwhelming evidence to the contrary, that they did not violate any court orders (A 36), that they "can't speak for the future" regarding further violations of court orders (A 39) and by taking the Fifth Amendment regarding their federal income tax problems (A 64-65).

In essence, the Derzacks are asking this Court to remove two adopted children from the adoptive parents who have parented them for over two years, and return them to two former adoptive foster parents who subjected these children to tabloid media and general turmoil, and who exploited them in an effort to manipulate the child welfare system for their own mysterious purposes. Their due process claim has no basis in law or fact and fails to present a compelling reason for review by this Court, and thus, should be denied.

CONCLUSION

This case does not merit further review by this Court. For the foregoing reasons, the Derzacks' Petition should be denied.

Respectfully submitted,



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